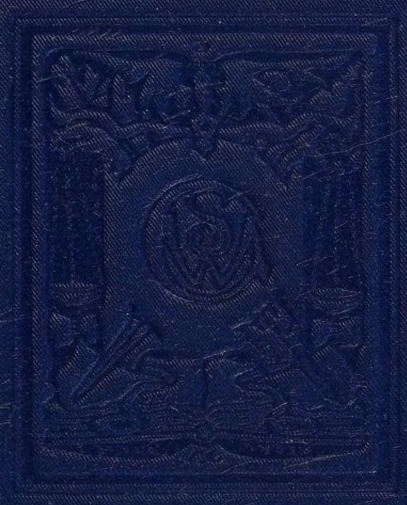

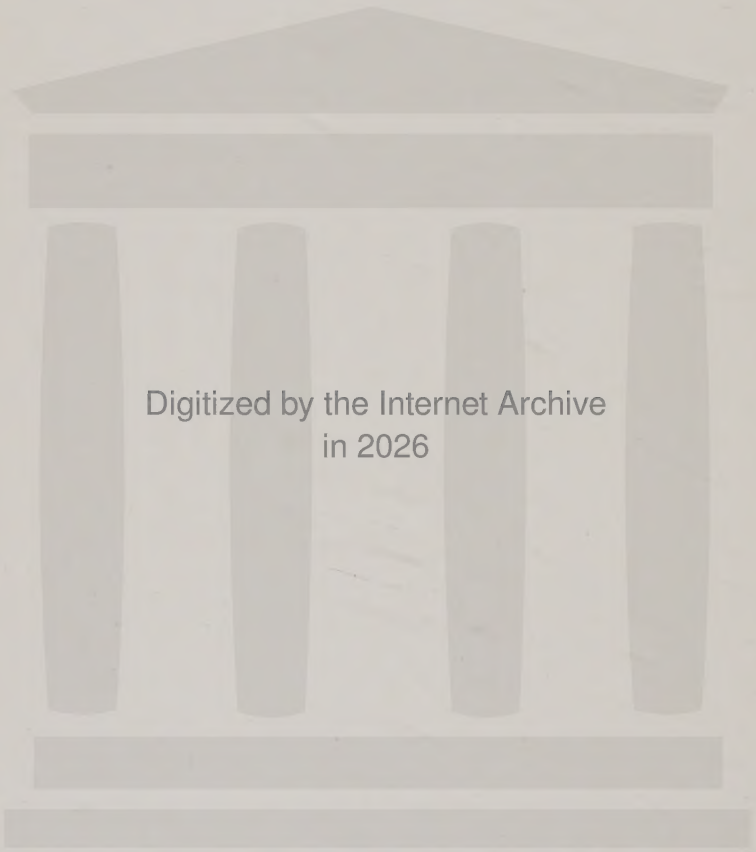
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THE CONFIRMATION OF EXECUTORS IN SCOTLAND

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THE CONFIRMATION OF EXECUTORS IN SCOTLAND

ACCORDING TO THE PRACTICE IN THE COMMISSARIOT OF EDINBURGH

BY

THE LATE JAMES G. CURRIE

DEPUTE COMMISSARY CLERK OF EDINBURGH

FOURTH EDITION

REVISED AND IN PART REWRITTEN

BY

JOHN BURNS, W.S.

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CHAPTER 1

THE COURTS AND THE EXECUTORSHIP

CONFIRMATION is the ratification by a competent court of an appointment of executors, made either by the deceased or by the court, and constitutes a title to uplift, administer, and dispose of the personal estate of the deceased contained in an inventory given up by the executors, and upon which the confirmation proceeds. On its limited effect as compared with probate in England, see p. 186.

By the Sheriff Courts Act, 1876, s. 35, the commissary courts were abolished, and their powers and jurisdiction were transferred to the sheriffs, but it was provided that it should still be competent and proper to affix the seal of office of a commissariot to all documents to which it would have been competent and proper to affix it before the Act. The seal of office, and the term "commissariot" continued on it, still remain therefore as distinctive traces of the old courts. The term is convenient, in contradistinction to sheriffdom and county, with neither of which it is in all cases synonymous, and to distinguish, especially as regards records, what belongs to the sheriff courts proper, and what has been transferred to them from the commissary courts.

At the passing of the 1876 Act, as a rule, each county formed a commissariot, with an office in the county town, where the whole work of the commissariot was performed. By s. 54 of the Act the court of session was authorised to regulate procedure and fees, and the places at which business should be conducted and the records kept. An Act of sederunt was passed on 15 January 1890, since which date there have been some further changes, and as matters now stand the following is a list of the places at which commissary business is conducted.

COUNTY.	TOWN.
ABERDEEN . . .	Aberdeen only. Writs for appointment of executors-dative may be lodged through Peterhead.
ARGYLL . . .	Inventories and confirmations at Dunoon only. Petitions are also received in each of the district courts at Campbeltown, Oban, and Fort William.
AYR	Ayr and Kilmarnock, all purposes.
BANFF . . .	Banff only.
BERWICK . . .	Duns only.

County.	Town.
Bute	Rothesay only.
Caithness	Wick only.
Clackmannan	Alloa only.
Dumbarton	Dumbarton only.
Dumfries	Dumfries only.
East Lothian	Haddington only.
Elgin	Elgin only.
Fife	Cupar, all purposes. Kirkcaldy and Dunfermline, appointment of executors-dative, petitions for special warrants, and all contentious business, provided the deceased resided in the district. Small estates at any of the three places, as most convenient for the applicants.
Forfar	Forfar, Dundee, all purposes. Appointment of executors-dative also at Arbroath.
Inverness	All inventories and confirmations at Inverness. Appointment of executors-dative also at Fort William, Portree, and Lochmaddy.
Kincardine	Stonehaven only.
Kinross	Kinross only.
Kirkcudbright	Kirkcudbright only.
Lanark	Glasgow, Hamilton, Airdrie, and Lanark, as if each district were a separate county.
Linlithgow	Linlithgow only.
Midlothian	Edinburgh commissary clerk only.
Nairn	Nairn only.
Orkney	Kirkwall only.
Peebles	Peebles only.
Perth	Perth and Dunblane, all purposes.
Renfrew	Paisley and Greenock, all purposes.
Ross and Cromarty	Inventories and confirmations at Dingwall only. Dingwall, Tain, Cromarty, and Stornoway for petitions for executors-dative, which must be in the court of the district of deceased's residence.
Roxburgh	Jedburgh for all purposes. Petitions for executors-dative also at Hawick.
Selkirk	Selkirk only.
Shetland	Lerwick only.
Stirling	Stirling only.
Sutherland	Dornoch only.
Wigtown	Wigtown only.

Clerk of Court.—Under ss. 36-38 of the 1876 Act the office of commissary clerk has been merged in that of sheriff clerk, except in Edinburgh, where the office continues distinct from that of sheriff clerk, and is regulated by the Act 4 Geo. IV. c. 97, s. 5. A sheriff clerk, or his depute, cannot act as an agent either directly or indirectly in the court of which he is clerk.[1] It is also incompetent for a clerk of court to act as clerk either personally or by his depute in any cause to which he is a party.[2]

[1] Act of Sederunt, 10 July 1839, s. 160; *Smith and Tasker* v. *Robertson*, 1827, 5 S. 848.

[2] *Manson* v. *Smith*, 1871, 9 M. 492.

The course in these circumstances is to apply to the court to appoint a clerk to act *pro hac vice*.[1] Where the commissary clerk is an applicant for confirmation, the practice is to apply by petition to the sheriff for warrant to the depute to act and sign the confirmation.

Agents.—The agents entitled to practise in commissary causes, where any application to the court by petition is necessary, are the law-agents enrolled in the sheriff court of the county. In many districts it has been the practice to assume that there is no restriction as to the persons who are entitled personally to give up an inventory and expede confirmation on behalf of the executor, but this has been challenged. The practice in regard to conducting business by correspondence is regulated by Act of sederunt 15 January 1890, which provides that an executor or any qualified law-agent in Scotland acting on his behalf may send an inventory with the relative writs, to any commissary or sheriff clerk, for registration in the books of his court, and the clerk shall receive and record the same as having been presented by the sender, and transmit the confirmation and relative writs to the presenter by post, if required, on payment of the usual fees, but nothing in the Act is to affect the procedure with reference to petitions in executry causes. The effect of this proviso is that petitions can be received only when signed, and presented personally, either by the parties or by a practitioner in the local court. As to appeals, see p. 227.

Nature of Commissary Jurisdiction.—The jurisdiction is essentially of an administrative and tentative nature. In *Hamilton* v. *Hardie* [2] Lord Shand said:—

> The effect of confirmation is merely to give a title to the executors to administer the estate of the deceased, and they are liable to an action . . . to have the deed set aside. . . . The practice is to give confirmation subject to any challenge of the will at a future time.

In commissary procedure findings beyond its own limited jurisdiction are to be avoided. Thus where there was a mutual will appointing the survivor to be sole trustee, and then a codicil by one of the testators appointing other administrators, the sheriff issued findings that the mutual will was irrevocable, and that the codicil, so far as purporting to revoke, was inept and invalid. Lord President Robertson said [3]:—

> I cannot say that I am surprised that the appellants should feel uneasy at the pronouncing of these findings. . . . In any view, I should not be inclined to adhere to findings such as those. The duty of the sheriff as commissary is to determine who is entitled to the office of executor, *on the face* either of the deeds which are put before the court, or of the relation to the deceased which is set out as the title of the applicant.

[1] *Macbeth* v. *Innes*, 1873, 11 M. 404.
[2] 1888, 16 R. 192.
[3] *Martin* v. *Ferguson's Trs.*, 1892, 19 R. 474.

In the same case Lord M'Laren, concurring in holding valid a new appointment of executors in the codicil, said :—

> In coming to this conclusion I, of course, give no opinion as to the validity of this codicil in so far as it deals with the estate for testamentary purposes.

In a later case [1] a mother and daughter made a mutual will, appointing executors of the survivor, and declared to be irrevocable, and then, after the mother's death, the daughter made a new will appointing different executors. The sheriff found that the mutual will was valid and contractual in all its terms, and that, therefore, it was incompetent for the survivor to supersede the executors thereby appointed. These findings were viewed with disapprobation. Lord Kinnear said :—

> I am not prepared to dispose of the merits of the question between the rival deeds in this competition, and if the sheriff is right in saying he could not have pronounced the interlocutor which he has pronounced without deciding the merits, that is a reason for saying that he ought not to have pronounced that interlocutor. . . . It would serve no purpose to express any opinion on the true question in this process, because it would not be *res judicata* in a question between the parties having the real interest, *i.e.* the beneficiaries under the respective documents.

Two points of importance are brought out by Lord Adam's opinion in the same case. Under the mutual will the estate of the predeceaser was left to the survivor absolutely, subject to the second part of the document, by which the survivor left her estate to beneficiaries. In this position of matters his lordship said :—

> Mrs B. [the daughter] admittedly died in full possession of her estate and left a will, *ex facie* quite valid, by which she appointed executors to administer her estate. Why should that appointment not be valid ?

But his lordship proceeded :—

> The answer [alleged] is that a certain prior deed deprived her of the power of testing. I do not say that, if the meaning of that deed were admittedly so clear as to be indisputable, we might not [even in this commissary process] hold the last will to be beyond doubt invalid. But that is not the case here.

Office of Executor.—It is of great practical importance to grasp what exactly is the quality of an executor's office. There has been serious misunderstanding, but recent decisions have again cleared the position. The true view was well expressed by Lord Kyllachy as follows :—

> An executor is not a trustee for the deceased's creditors, but simply the representative of the deceased ; he stands simply in the deceased's shoes, being debtor to her creditors, and creditor to her debtors, and, in short, he is *eadem persona cum defuncto* subject to one limitation, viz., limited liability.[2]

[1] *MacHardy* v. *Steele*, 1902, 4 F. 765. [2] *Mitchell* v. *Mackersy*, 1905, 8 F. 198.

Again :—

Towards the creditors of the deceased it appears to me that she [the executrix] is simply *eadem persona cum defuncto*, standing to the creditors in no other relation than the deceased stood, except that she is a debtor with limited liability, viz., a liability limited by the amount of the deceased's estate. An executor is not a trustee for the deceased's creditors. He is no more so than an heir entering *cum beneficio inventarii*. He is, in a question with creditors, the proprietor of the estate under burden of payment of their debts. He is not a depositary. He is a debtor, and the equities which result from the position of a depositary—that is to say, of a trustee—are wholly inapplicable.[1]

These views are completely supported by the cases from which these quotations are taken and by the others noted below, and it results—

1. An executor is not bound to segregate the assets. It is enough if he retains funds of the value of the deceased's estate at the date of his death and is ready to pay claims to that amount.[1] But as to quantum the inventory is not conclusive.

2. He is not bound to account to creditors for profits which he may have made by using the assets.[1]

3. Creditors may acquire preferences by diligence after the death of the deceased. [2]

4. Creditors may set off debts due to them by the deceased against debts due by them to the executor.[3]

5. After the expiry of the six months the executor may pay to claimants in full or rateably, without regard to possible liabilities upon which no claims have been intimated.[4]

[1] *Stewart's Tr.* v. *Stewart's Exrx.*, 1896, 23 R. 739.

[2] *Globe Insurance Co.* v. *Scott's Trs.*, 1849, 11 D. 618.

[3] *Mitchell* v. *Mackersy* overruling *Gray's Trs.* v. *Royal Bank*, 1895, 23 R. 199.

[4] *Laird* v. *Hamilton*, 1911, 1 S.L.T. 27 ; *Taylor & Ferguson* v. *Glass's Trs.*, 1912 S.C. 165.

CHAPTER II

DOMICILE

It is not possible in this work to omit to deal with the subject of domicile, for that legal quality or relation has a vital bearing on different aspects of the main subject. On the other hand it would be wholly out of place to attempt any substantive treatment, such as is appropriate to a treatise on private international law. At the outset it may be noted that at the time of writing the most up-to-date discussions on domicile in England and Scotland are in Westlake's Private International Law, 6th ed., by Bentwich; Conflict of Laws, 3rd ed., by Dicey and Keith; which are exhaustive; and Walton on Husband and Wife, 2nd ed. by Wark, where, though the learned editor-author disclaims any attempt at substantive treatment, and though his chapters on the subject are in part naturally specially addressed to the constitution and dissolution of marriage, the reader will find much that is extremely serviceable in relation to questions arising in commissary practice. In that practice the following specialties exist in regard to domicile:—

1. It is mainly administrative, and not contentious practice.

2. The evidence of the *de cujus* is not available.[1] This is the same position as in contentious succession practice, but it differs from practice in divorce. And of course the deceased's written evidence is available, though not always very important. Further, in cases of derivative domicile, *e.g.* wife's from husband, oral testimony may be available.

3. There is the provision in s. 17 of the 1858 Act, as modified by s. 41 of the Sheriff Court Act, 1876, that the executor's oath that the deceased died domiciled in Scotland shall be sufficient to authorise the same to be stated by the sheriff clerk in a note on the confirmation, which "shall be conclusive evidence of the fact of domicile," as to which, see p. 102. And the somewhat similar provision under the Intestate Husband's Estate Acts, as to which see p. 86.

4. The element of local domicile in a particular sheriffdom or district, in relation to the distribution of commissary business.

Administrative Practice.—It is to be kept in view that the great bulk of business relating to the appointment and confirmation of executors is administrative and non-contentious. The proof of that is seen in the rarity of appeals to the court of session from the sheriff court on its com-

[1] Lord Shand in *Steel* v. *Steel*, 1888, 15 R. 896.

missary side. That is not to say that many interesting and difficult questions do not come up for consideration, but very often a way is found through, or round, these by the experienced and kindly advice of the officials in the different courts, and especially of the holder of the office of depute commissary clerk of Edinburgh. This is a matter which naturally was not spoken of in previous editions of this book, but it is now all the more fitting that witness should be borne to the ability and amiability with which the present holder of that office and his predecessors have placed their constructive suggestions, based on full knowledge alike of principle and practice, at the service of the profession, both directly and through other officials. In like manner Mr Petrie has given much kind assistance on the present occasion, but he is not responsible for opinions expressed throughout this edition. So much for one side of it, but then, of course, there are cases which do not lend themselves to adjusted solution in this way. These usually go straight to the law courts, and not by way of appeal from the commissary side, and the administrative aspect is left in suspense or possibly treated by the universal Scottish solvent of the appointment of a judicial factor.

The distinction which we thus take between contentious and administrative business has direct application to the subject of the domicile of the deceased. Lord M'Laren writes:[1]—

> As residence is the basis of domicile, it follows that the place where an individual was "commorant," or habitually resident, at the time of his death shall, in the absence of any contention to the contrary, be presumed to be his domicile for purposes connected with the administration of his succession. On this principle the commissary courts grant confirmations to the next-of-kin of all intestates resident in Scotland at the time of death, where no competing claim is made by persons claiming the character of personal representatives under the law of another domicile. But this is only a rule of administration, and where the fact of domicile is brought into controversy, there is no presumption in favour of the last place of residence. The fundamental point is the ascertainment of the "origin" of the person whose domicile is in question, and the onus of proof is on the party seeking to displace that domicile and to establish a domicile of choice. The domicile of origin, being admitted or ascertained, becomes the presumed domicile through life, until it is displaced by proof of an acquired domicile more proximate to the period to which the investigation is directed.

In these remarks on domicile, Lord M'Laren speaks of "purposes connected with the administration of succession." The following are, subject to legislative modifications, among these—

Purposes.—1. The personal testamentary capacity of the deceased.

2. Restraints on that capacity in favour of the family, or otherwise, as by our old law of deathbed.

3. Formalities of will-making.

[1] Wills and Succession, 3rd ed., 6.

4. Competing rights to the function of administration.

5. Beneficial succession.

6. Estate duty, which is the only death-duty with which we are here really concerned. If the deceased was domiciled in the United Kingdom estate duty is payable on all his moveable property wherever situated; if not, that duty attaches only to his estate locally situated in the United Kingdom.

The word "domicile" is used in various senses. Thus we speak of domicile of succession, legal domicile (p. 24), domicile of citation, trade domicile, and even a so-called matrimonial domicile. For the present purpose it is the first only of these which interests us, and by the law of nations there can be only one domicile of succession. To this, however, we must make an apparent exception, for, as commissary business is distributed over the different sheriffdoms, and (in some cases) the different divisions of these sheriffdoms, there is raised a kind of local domestic domicile or settlement, which has its own importance for administrative purposes, though this is hardly a matter on which the successors of the deceased, whether fiduciary or beneficial, on testacy or intestacy, can have any interest or any cause to differ among themselves. On this minor question the non-contentious canon laid down by Lord M'Laren is supreme and final. One never heard of an appeal to the county of origin for this purpose, nor of any judicial appeal with reference to a question of this kind, nor of a challenge of an executor's title as having been granted or confirmed, or both, in a wrong sheriffdom or the wrong division of the right sheriffdom. The position at the death is the test for this purpose. Even so, questions might easily be raised, but, as has been indicated, it is not worth while to be contentious.

Difficulty of Definition.—Domicile has not been found capable of any strict definition. Needless to say it is not a place. It is a legal conception, a relation between a person and a place. It is not coincident with actual residence, or the possession of a residence. A person may not be residing, and may have no residence, and may never have resided or had a residence, at the place where his domicile is. Nor is it nationality or political allegiance; a person may be the subject of one State while he is domiciled in another. The most helpful description of domicile is given in the following statement of what is involved in changing it, and it has the accumulated authority of Lord Curriehill,[1] Lord President Inglis,[2] and the Earl of Halsbury, L.C.[3]

> To abandon one domicile for another means something far more than a mere change of residence. It imports an intention, not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the [country of the] domicile confer on the denizens of the country in their domestic relations, in their business transactions, in their political

[1] *Donaldson* v. *M'Clure*, 1857, 20 D. 307.

[2] *Steel* v. *Steel*, 1888, 15 R. 896.

[3] *March. of Huntly* v. *Gaskell*, 1905, 8 F. (H.L.) 4,

and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death.

The law distinguishes (1) domicile of origin; (2) other derivative domiciles; and (3) domicile of choice.

Domicile of Origin is not necessarily at the place of birth. It is the domicile of the father at the time of birth, or, in illegitimacy, the domicile of the mother, which, if the mother is a married woman, may mean the domicile of her husband. The domicile of origin is retained until a new domicile is acquired. It is not lost by mere abandonment; a person may have left the country of his domicile of origin *animo non revertendi*, but until he has actually fixed his residence elsewhere the domicile of origin adheres. Practically, therefore, there is no person without a domicile, and no person can have more than one domicile at the same time. On the abandonment of an acquired domicile the domicile of origin revives until a new one has been acquired. The domicile of origin holds whether the person dies *in itinere* from or to the place of it. If *in itinere* from it, that means that the intended new domicile of choice has not taken effect, and the fundamental or radical domicile of origin therefore subsists. If *in itinere* back to it, that means that the intervening domicile of choice has been abandoned, whereupon the fundamental domicile of origin automatically becomes operative. Nay, the same thing holds if death occurs *in itinere* from the place of one domicile of choice to another; the former is extinguished by the fact of quitting the country, while the latter is not established because the intention of establishing it has not been supplemented by the fact of arrival in the country; therefore the persistent domicile of origin is resurrected. In all these cases it is not clear whether the domicile which thus adheres and reverts is the domicile of birth, or any other domicile the child, before he becomes *sui juris*, may acquire from the father.[1]

It may be noted that the above does not, or may not, account for the following special cases:—

1. *Posthumous Children.*—It is said that they, though legitimate, take the domicile of the mother at the birth,[2] where the mother has, since the father's death, acquired a new domicile for herself or has reverted to her own domicile of origin. There is no decision.

2. *Putative Marriage.*—Children of parents who are not married, but where the children are legitimate owing to the *bona fides* of (say) the mother only. It has been stated judicially in the Outer House that the children take the mother's domicile.[3]

3. *Legitimation per Subsequens Matrimonium.*—The rule has been laid down thus:[4]—

> If and so soon as a child born out of wedlock is legitimated, being a minor [in Scotland, a pupil ?], the domicile of its father at the time of such legitimation becomes its domicile;

[1] *Craignish* v. *Hewit*, [1892] 3 Ch. 180.
[2] Dicey, 108.
[3] *Smijth* v. *Smijth*, 1918, 1 S.L.T. 156.
[4] Westlake, 331.

—and is of the nature of a domicile of origin, in which sense the child has two successive domiciles of origin—first, the mother's; and, second, the father's. But it is to be remembered that legitimation *p.s.m.* operates even when the child has died before the marriage; which appears to involve the logical possibility of what is surely legally impossible, namely, a change of domicile after death. It may be that the rule quoted above operates only if the child is in life at the date of legitimation.[1]

Another view is, that in all cases the domicile of origin remains the mother's domicile at the birth, though on legitimation the child, if a minor (or pupil) takes a derivative domicile from the father. This would make a fundamental difference.

Other Derivative Domiciles are those of (1) wives, and (2) children.

Wives.—A woman on marriage acquires the domicile of her husband. There is nothing in recent legislation to alter this rule. Not only so, but so long as the marriage subsists she follows all changes in her husband's domicile. If he changes his domicile from Scotland to some other country she cannot retain a Scottish domicile. It matters not that the parties are living separate, whether by agreement or by desertion on the part of either spouse, nor that the husband has contracted a subsequent bigamous marriage, nor that decree of adherence could not be obtained against the wife, nor that the facts are such that she could obtain decree of separation or divorce.[2] The case referred to is all the more valuable for the present purpose in that the Inland Revenue was there trying to establish an exception to the rule in order to obtain legacy duty on the wife's estate. But it is an open question whether there is not an exception when there has been a decree of separation, as that case shows. The wife taking the husband's domicile at the date of the marriage of course leaves her own domicile of origin unaffected.

Children.—During pupillarity a child follows the domicile of his father; and on the father's death the domicile of the mother,[3] unless she changes the domicile with the express purpose of altering the child's succession. The mother's power may now, in the case of property, be viewed more liberally when she is the sole statutory tutor, with authority over both person and estate. It is also naturally viewed more liberally in Scotland than is any guardian's power in England, where the court regards itself as being the real guardian. It is, however, recognised that the mother, on changing her own domicile, is able to arrange for the continuance of the child's existing domicile, which probably requires the child's continued residence in the country of that domicile. It is to be noted that apparently any domicile of the child derived from the mother is conditional on joint residence.[4] Fraser says, "if the child live with the mother," which is not understood to be a condition affecting any deriva-

[1] Dicey, 109.

[2] *Mackinnon's Trs.* v. *Inl. Rev.*, 1920 S.C. (H.L.) 171.

[3] *Arnott* v. *Groom*, 1846, 9 D. 142; *Crumpton's J. F.* v. *Finch-Noyes*, 1918 S.C. 378.

[4] Fraser, Husband and Wife, 2nd Ed. 1253; quoted in *Crumpton, supra.*

tive domicile or domiciles which a child acquires from the father. Finally, "if the mother marries a second time, the domicile which she acquires by her second marriage would not become that of the child, but its domicile would continue to be that which the mother possessed previously to her second marriage." [1]

Divorce or Judicial Separation.—In the above statement it has been assumed that no question of the mother's power over the child's domicile can arise until after the father's death. But by s. 7 of the Guardianship of Infants Act, 1886, the court has power, in granting decree of divorce or separation, to declare the defender unfit to have the custody of the children, and orders for custody by the mother are in fact often made. It is not known that there has been any decision on the possible effect on the child's domicile.

It would appear that by the law of Scotland a minor may choose his domicile on attaining the age of puberty. A minor may be forisfamiliated, and marry, and change his actual home, and it is reasonable to hold that he may also change his legal home or domicile.[1]

Domicile of Choice "is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there." [2]

A new domicile is acquired by residence *animo manendi*. Whether it has been acquired is a question of fact. The duration of the residence is not an element of much importance if the *animus* be clear; but there must be actual residence, however brief. If the person dies *in itinere*, the intended domicile will not attach, as it would do if the journey were from the country of an acquired domicile to the country of the domicile of origin. A sufficient *animus manendi* need not be a definite intention to remain at the place always. It is rather an intention to remain there for an indefinite period. And the intention can be proved only by reference to the whole circumstances in each particular case. For while there is no fact in a man's history or surroundings which may not form an element in the proof, there is hardly any one circumstance which can be considered of itself conclusive. Declarations by the person himself are important; but even they have been discarded when they were inconsistent with his acts. General indications of intention are held to be more trustworthy than special statements. A man cannot fix his domicile by a mere resolution. Though a deceased in his will may have described himself as domiciled in one country, it has frequently been held on his death that he was domiciled in another [3] (*Smith*, 9 March 1870; *Adie*, 14 March 1881; *Cunningham*, 17 Nov. 1885).

Particular Cases.—*A lunatic* does not acquire a domicile in any place

[1] *Arnott* v. *Groom*, *supra*.

[2] Lord Westbury in *Udny* v. *Udny*, 1869, 7 M. (H. L.) 89; quoted by Lord President in *Crumpton's J. F.* v. *Finch-Noyes*, 1918 S.C. 378.

[3] *Corbridge* v. *Somerville*, 1913 S.C. 858.

where he may be residing under restraint, and consequently retains the domicile which he had previous to his confinement.[1] Probably mental incapacity which would invalidate the execution of a will would also prevent the acquisition of a domicile.

There is some authority for the view that if a child is never sane when otherwise he would be *sui juris*, he continues to follow his father's domicile.[2]

A domestic servant is in general domiciled in the place of residence as a servant. But there is nothing in the nature of domestic service to necessitate the acquisition of a domicile, and the domicile of origin will not be held as lost without some evidence of an intention to abandon it. If a male domestic is married, the home in which his wife and family reside will be his domicile, wherever he may be engaged in service.

A student does not acquire a domicile at a university by residence there for the purpose of his education, but he may do so if he has no other home (*Traill*, 24 August 1859).

Mariners, *actors*, and others, whose profession or inclination leads them to spend a wandering and unsettled life, and who have no fixed residence to which they always return, retain their domicile of origin.[3]

An exile or political refugee does not lose his domicile in the country from which he is expatriated, so long as his absence from it is due to compulsion and not to choice.

A man does not acquire a domicile so as to affect his succession by living in a savage or barbarous country not belonging to the community of civilised states (*Howison*, 7 May 1875).

Ambassadors and consuls do not acquire a domicile by official residence in the country to which they may be accredited ; but if they are already domiciled there, they do not, in virtue of their appointment, acquire a domicile in the country they represent. An ecclesiastic is domiciled in his benefice ; but a parish minister, who has given up the active duties of his parish, is not prevented from acquiring a domicile elsewhere by continuing to hold the appointment.

Fighting Services.—A person entering the military or naval service of a foreign country acquires a domicile in that country,[4] but any British subject who joins the navy, army, or air force of Great Britain, wherever he may be stationed or called on to serve, retains the domicile he had when he entered the service ; and this rule applies to an acquired domicile as well as to the domicile of origin.[5] The following case occurred in the commissary court of Edinburgh : Neither the deceased nor his father ever had any residence in Scotland ; his grandfather had been born at Dalkeith in 1758, and while a young man he joined the army ; his father was born in Antigua while the grandfather was stationed there, and he,

[1] Dicey, 152.

[2] *Sharpe* v. *Crispin*, 1869, 1 P. & M. 611.

[3] *Aikman* v. *Aikman*, 1861, 3 Macq. 854.

[4] This must be taken with caution, *Re Mitchell*, [1884] 13 Q.B.D. 418.

[5] *Macreight*, 1885, L.R. Ch. Div. 30, 165.

too, joined the army in early life ; the deceased was born while his father was in the service, and he also had joined it and died in it ; his domicile was held to be the domicile of origin of his grandfather (*Peddie*, 6 Dec. 1860).

Anglo-Indian Domicile.[1]—The following is quoted from Lord President Inglis in *Steel's* case :—

Something was said about an Anglo-Indian domicile. . . . Why an Anglo-Indian domicile should be suggested for a Scotsman I do not know ; I think, with Lord Cranworth, that it would be a Scoto-Indian domicile ; but let that pass. An Anglo-Indian domicile or a Scoto-Indian domicile applies only to persons who go out to India in the service of the East India Company as it was formerly, or in the service of the Indian Government as the matter stands now, and it is so because the nature of the employment which the parties have accepted makes it their duty to reside permanently in India. But that does not apply in the slightest degree to a trader. He does not go to Burmah because his duty requires him to reside there. The pursuer here went to Burmah for the sake of trading, just as he went to Java before, and as he went to many other places in the course of his life. He went there not as a resident, not as a citizen of the country, but as a foreign trader. So that the idea of a domicile acquired in that way must be at once dismissed.

The real position appears now to be that there is no such thing as an Anglo-Indian domicile ; that there is neither impossibility nor extreme improbability in the acquisition of a domicile in India, but that it is subject to the conditions elsewhere applicable, subject to the provisions of the Indian Succession Act, 1865, from Part II. of which the following is quoted :—

10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's civil or military service, or in the exercise of any profession or calling.

ILLUSTRATIONS

(*a*) A, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(*b*) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(*c*) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(*d*) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that

[1] *Wauchope* v. *Wauchope*, 1877, 4 R. 945 ; *Steel* v. *Steel*, 1888, 15 R. 896 ; *Abd-ul-Messih* v. *Farra*, 1888, 13 A.C. 431.

purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(*e*) A, having gone to reside in British India under the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(*f*) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(*g*) A, having come to Calcutta under the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

11. Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the Local Government) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

Divided Residence.—When a man has two residences, one in the country and the other in the metropolis, the presumption is held to be that, if he be a nobleman or landed proprietor, his domicile is in the country; but that, if he be a merchant, or in the practice of any trade or profession, his domicile is in the metropolis.[1]

The General Problem.—It is in cases that cannot be classed under any special head that difficulty in determining the domicile most frequently arises. These cases may be said to range between that of the settler on the one hand, and the visitor on the other, about neither of which can there be any doubt. When an emigrant leaves his native country to settle in some foreign land and make it his home, and dies at any time after reaching his destination, he has clearly become domiciled in the land of his adoption. A vague hope or desire to return, which may be nothing more than an impulse of patriotism or domestic affection, will not, in these circumstances, prevent the acquisition of a new domicile. On the other hand, where a person goes abroad only for a special purpose or a limited time,—to construct a railway or harbour or canal, to erect a gas work or introduce some new machinery or apparatus, to wind up a mercantile business, to fulfil a temporary appointment, to prosecute some scientific inquiry, to spend the winter in a milder climate, or simply to indulge in the recreation of foreign travel, if such a person dies abroad, it is equally clear that, unless there has been some change of purpose, no alteration on domicile is effected. Between these two, however, there is a wide gradation of cases.

[1] Alexander's Practice, 28; *March. of Huntly* v. *Gaskell*, 1905, 8 F. (H.L.) 4.

There is always a certain presumption that the place where a person actually resides is the place where he wishes and intends to reside; and though mere length of residence in any place will not fix a domicile there, the longer the residence the stronger is the presumption of permanency. But the strongest presumption is that, where the domicile of origin is known, it must be held as retained until the contrary is proved. "Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning the domicile of origin. The change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change." [1]

The following elements are of more or less importance in individual cases.

1. The family home.
2. Length of residence.
3. Naturalisation.
4. Marriage in the country, especially to a native of the country.
5. Purchase of a residence.
6. Public offices.
7. Making a will in the form of the country and appointing trustees there.
8. Education of children.
9. Settling sons and daughters in the country by partnership premiums, marriage portions, etc.
10. Interments.

These are all indications in aid of the discharge of the onus of proving the acquisition of a new domicile. *Ergo*, the absence or contradictories of them support the domicile of origin. Beyond that, it is noticeable that the proof of adherence to, say, a Scottish domicile of origin is usually of a nature which appears to confound domicile with nationality, going to show that the deceased expressed patriotic Scottish sentiments, joined Burns and Scott clubs, St Andrew societies, and Scottish corporations, and celebrated the principal Scottish annual festivals.

In the cases there is found some inconsistency on the point of an intention to return in the future to the country of origin. The one view is that a remote intention to return at some unknown time—when a fortune has been made—does not prevent the acquisition of a domicile of choice in the country of residence. The other view treats an intention to return at any time as negativing the *animus manendi*, and this is the later and modern tendency.[2]

Illustrations.—A Scotsman, after forty years in the army, spent twenty years in England. He never visited Scotland while in the army or after-

[1] *Aikman* v. *Aikman*, 1861, 3 Macq. 854, *per* Lord Wensleydale; *Vincent* v. *Earl of Buchan*, 1889, 16 R. 637.

[2] *James* v. *James*, 98 L.J. 438; *Steel* v. *Steel*, 1888, 15 R. 896.

wards. He had no fixed residence in England, but lived in hotels and in lodgings in London, and at various watering-places. There was no evidence of any expressed intention to make England his home. It was found by the court of chancery that the domicile of origin had not been abandoned.[1]

A Scotsman became a merchant in Rangoon, and for fifteen years resided chiefly there, paying occasional visits to Scotland. He then formed a branch of his business in London, and for the next fourteen years, during which he married, lived in London. He thereafter returned to reside in Scotland, and it was held that as he had never manifested any intention of abandoning his domicile of origin, it had never been lost.[2]

A Scotsman passed at the Scottish bar, and thereafter removed to London, where he resided continuously for nearly fifty years. He continued to hold considerable heritable property in Scotland. In sustaining a Scottish domicile it was observed—

> The allegation that one would look for in these circumstances is not a mere assertion that there was an English domicile at the date of death. There should be a further allegation that there was a change of domicile, and a statement as to how and when that change took place. As we have had occasion to remark lately, a change of domicile is not very easily brought about, and there must be a clear indication of intention to change his domicile by the gentleman whose domicile of origin is said to be lost." [3]

The daughter of a Scottish earl and wife of a Scottish landed proprietor, on the death of her husband, left Scotland and went to London, where she continued to reside until her death five years afterwards. She had expressed her intention not to return to live in Scotland, and to have no permanent home anywhere else. It was held that, as she had not *animo et facto* acquired a new domicile, her domicile of origin had not been abandoned.[4]

A Scotsman entered the navy at eighteen; served at sea four years; married a Maltese in Malta; land duty in Malta for six years; on half pay returned to Scotland, but got no situation; got one in London but had to leave for health; returned to Malta, where he held appointments for a number of years. At this stage the question arose for divorce, and he was held to be domiciled in Scotland.[5]

A Scotsman aged thirty-four separated from his wife; had worked in England for eleven years in various places because the pay was better than in Scotland. Scottish domicile sustained.[6]

An Englishman was the principal partner in an English bank; held large landed estates in England; houses in London and Manchester; M.P. for an English constituency; owned Deeside estate, and resided

[1] *Patience* v. *Main*, 1885, 29 Ch.D. 976.

[2] *Steel* v. *Steel*, 1888, 15 R. 896; see also *Jopp* v. *Wood*, 34 L.J. Ch.D. 212.

[3] *Hamilton* v. *Hardie*, 1888, 16 R. 192, *per* Lord President; see also *Urquhart* v. *Butterworth*, 1887, 37 L.R. Ch.D. 357.

[4] *Vincent* v. *Earl of Buchan*, 1889, 16 R. 637.

[5] *Low* v. *Low*, 1891, 19 R. 115.

[6] *Hood* v. *Hood*, 1897, 24 R. 973.

there as his chief residence for thirty years before his death. Held domiciled in England.[1]

A Scotsman went out to Ceylon at twenty-two to push his fortune. He prospered and remained. Built a house there; never married; learned the languages; liked the country and the people; disliked Scotland; died on a visit to England at fifty-three, with his passage paid back to Ceylon. Ceylon domicile upheld. This was a death case and an inland revenue case.[2]

A man born in France of a Scottish mother, who brought him up in Scotland, lived twenty-three years in India; thereafter a wandering life. Scottish domicile of origin held, and held that it had been retained.[3]

The Administrative Title.—The right to confirmation is regulated by the law of the deceased's domicile. This is in accordance with the principle of private international law that moveable or personal property follows the person, so that the parties entitled to its administration and to share in its distribution on the owner's death are determined, not by the law of the place where it is situated, but by the law of his domicile. But although the right to administer is determined by the law of the domicile, the administrative title must be granted by the courts, and in accordance with the judicial forms, of the country in which the estate is situated and the debtors reside. No title can affect estate not within the jurisdiction of the court which grants it. Where a title to administer has been granted by a competent court in the country of the deceased's domicile, its effect as an active title to collect, uplift, and grant discharges for the estate is limited to that country. If there is estate elsewhere, an ancillary title must be obtained in the courts of the country where the estate is. But it is not necessary that the person entitled to administer should in the first place obtain a title or have his right recognised in the courts of the deceased's domicile. There may be no estate there in respect of which any administrative title is necessary. It is very common for persons having an interest in a Scottish succession, which can only be discharged by a Scottish title, to die domiciled abroad without any other estate, and in whose case, therefore, administration in Scotland is alone required. Besides, there are countries in which there is no process analogous to confirmation or to the granting of probate or letters of administration, and where the beneficiaries obtain possession of the personal estate by a direct title, as the heir in heritage in this country, without the intervention of any one whose function is merely administrative. But if the estate is in Scotland, it can be recovered only by an executor confirmed in a Scottish court. Yet in every case confirmation is granted to the persons whom the courts of the deceased's domicile either have appointed, or would recognise as entitled, to realise estate within their own jurisdiction. "The succession to moveable estate is regulated exclusively

[1] *March. of Huntly* v. *Gaskell*, 1905, 8 F. (H.L.), 4.

[2] *Lord Advocate* v. *Brown's Trs.*, 1907 S.C. 333.

[3] *Re Lassalle, per* Astbury J., Times, 28 March 1920.

by the law of the domicile, without any reference to the place where any portion of the moveable estate may be actually situate. The practice is to allow foreign executors to come here and obtain confirmation so as to give them a title to that portion of the moveable estate of a foreign defunct which happens to be situated in this country, and that whether the executor be an executor-nominate or an executor-at-law." [1]

The law as regards the administration of the estates of persons who die intestate, domiciled furth of Scotland, was settled in 1852. The mother of a deceased who had died domiciled in England, intestate, and predeceased by his father, had obtained letters of administration, and applied to the commissary of Edinburgh for the office of executor-dative. By the law of Scotland at that time the mother was not, under any circumstances, entitled to share in the intestate succession of her child, or to administer his estate, and the commissary, according to what had hitherto been the practice, refused the application. This judgment was reversed, and the case was remitted to the commissary with instructions to decern as craved, on the ground that the law of the domicile must regulate the succession, whether testate or intestate, and that the party in whom the title of administration is vested should, unless there are some peculiar specialties or clear conveniences to the contrary, be the same in other countries as in the country of the domicile.[2]

Averment of Foreign Law.—Since the *Hastings* case, in accordance with the instructions of the commissary in the first similar case thereafter (*Park*, April 1852), applicants for the office of executor-dative, wherever it has appeared that the deceased had died domiciled furth of Scotland, have been required to aver the law under which they claim the appointment. Where the deceased died domiciled in Costa Rica, a petition presented by the father, and claiming the office of executor-dative as having right to one-half of the estate under the Intestate Moveable Succession (Scotland) Act, 1855, was refused, and a new petition setting forth the petitioner's title according to the law of Costa Rica was presented and granted (*Melville*, 25 Sept. 1862). The propriety of insisting on this requirement was fully considered in a case (*Clark*, 9 Feb. 1874) where the usual statement had been omitted in the petition. The deceased died domiciled in Canada survived by a husband and sons. The sons applied to be decerned *qua* next of kin. The husband was no party to the application. The commissary held that, the deceased having died domiciled furth of Scotland, the law regulating the succession must be averred, and ordered the petition to be amended. On inquiry it was ascertained that the next of kin were entitled to administer only on the husband renouncing; a renunciation by him was produced; and thereupon the petitioners were decerned. In a case from Cape Colony the widow was decerned executor-dative in accordance with legal opinion from the Cape

[1] *Goetze* v. *Aders*, *per* Lord President Inglis, 1874, 2 R. 153.

[2] *March. of Hastings* v. *M. of Hastings' Exrs.* 1852, 14 D. 489.

that she was entitled in preference to next of kin and creditors (*Robertson*, 28 June 1901).

As regards the administration of the estate the difficulty of determining between two domiciles is frequently obviated,—in testate cases by the will being found to be validly executed by both the laws in question (*Ross*, 6 May 1862), or under the Wills Act, 1861 ; and in intestate cases by the application being presented by some person who in any event would be entitled to administer (*Pattison*, 15 Dec. 1869 ; *Alpine*, 29 Jan. 1874). Thus, where the doubt is whether a Scotsman, dying unmarried and without issue, and survived by his father, has acquired a domicile in England, the father, by the law of both Scotland and England, would be the person entitled to administer, though, according to the law of England, he would be entitled to the whole estate, and by the law of Scotland he might be entitled to only one-half.

English Law.—The consequences of assuming that, if the estate is in Scotland, the persons entitled to administer must be regulated by Scots law might be very serious to executors and cautioners. The cases of most frequent occurrence are where the deceased died domiciled in some country under English law. That law differs widely from the law of Scotland, as regards both testate and intestate succession. In England no will is valid, whether holograph or not, unless executed in presence of two witnesses. The testator signs only at the end, not also on each page or sheet, and he may sign by a mark, or any person whom he authorises may sign for him. A minor cannot make a will, and all wills are revoked by marriage, but under the Law of Property Act, 1922 (s. 152), as from 1 Jan. 1925, a will which bears to be made in contemplation of a marriage is not to be revoked by *that* marriage, and at present the will of an Englishwoman is not revoked by her marriage to a domiciled Scotsman, at least not as regards personal estate.[1] Further, it may be noted in passing that it appears that even in Scotland some testamentary " nominations " to small sums under special Acts are revoked by marriage.[2] In England also there are certain formalities in the execution of wills, the observance of which requires to be set forth in the attestation clause, or otherwise proved before probate can be obtained (p. 42). And in regard to intestate succession, when a wife dies survived by her husband, he or his representatives are entitled to administer and succeed to her whole personal estate, to the exclusion of her next of kin ; and the widow comes first in order as having right to administer her husband's estate. If there be no descendants and the intestate husband has died after 1st September 1890, and his whole real and personal estate does not exceed £500, the whole goes to the widow, and if it exceeds that sum she takes £500 in the first place, and her share of the residue.[3] Again, where a person dies intestate without wife or child, leaving a father, the father is entitled to administer and succeed to the whole estate, to the exclusion of brothers

[1] *Westerman's Ex.* v. *Schwab*, 1905, 8 F. 132.

[2] Chap. XX.

[3] 53 & 54 Vict. c. 29.

and sisters. Relatives on the father's and mother's side rank equally as next of kin, and the half-blood shares in the succession along with the full-blood. In England also the following order in granting administration is observed, and applicants must clear off those having a prior right to the grant, either as being dead, or as having renounced, or otherwise: —(1) husband or wife; (2) children; (3) grandchildren; (4) great-grandchildren; (5) father; (6) mother; (7) brothers and sisters, etc. In reckoning the more remote degrees of relationship also important differences exist. The instances given, however, are sufficient to indicate the risk of neglecting careful inquiry where the law of any English-speaking country other than Scotland regulates the succession, and the same risk applies to all cases of foreign domicile. Such inquiry, undertaken in obedience to the requirement that the law of domicile shall be set out in the petition, has in more than one case led to the discovery that the applicant had no title to the estate or to its administration, and to the withdrawal of his application (*Greig*, Jan. 1873).

Law of Property Act, 1922.—It seems helpful to set out here the new prospective English intestacy code as from 1 January 1925 (ss. 147–150).

The personal representative is to hold all estate both real and personal upon trust for sale or conversion, with power to postpone sale and conversion (and with special rules applicable to reversionary interests and personal chattels), and in the meantime the whole income is treated as income. After payment of funeral expenses, death duties, administration expenses, and debts, the proceeds of sale are to go as follows:—

(*a*) If the intestate leaves a spouse (with or without issue) the spouse takes absolutely—

1. What are known as personal chattels, being carriages, horses, stable furniture and effects (not used for business), motor cars (not used for business), garden live- and dead-stock and effects, domestic animals, plate, plated articles, furniture, furnishings and household plenishing, jewellery, personal articles, wines, liquors, and consumable stores, but not including chattels acquired for business purposes nor money or securities for money; and

2. A sum of £1000 free of death duties, with interest at 5 per cent. from the date of death.

(*b*) What remains is known as the residuary estate, and is to go as follows:—

1. The surviving spouse takes a life-interest in the whole or in one-half. The life-interest extends to the whole if the intestate leaves no issue. If he does leave issue, the surviving spouse's life-interest is restricted to one-half, rising, however, to the whole if the issue should fail to attain a vested interest in the capital.

2. Subject to the above purposes the residuary estate goes to the children of the intestate, living at his death, who attain majority or marry, and the issue, living at the death of the intestate, who attain majority or marry, of any child of the intestate who pre-

deceases the intestate, the division being *per stirpes*. Certain benefits received from the intestate during life, or under any partial will of the intestate, may have to be brought into account. Failing issue—

3. The residuary estate goes to the father and mother of the intestate equally, or to the survivor living at the death of the intestate. Failing them—
4. The brothers and sisters of the intestate, of the whole blood, living at his death, who attain majority or marry, and the issue, living at the death of the intestate and who attain majority or marry, of predeceasing brothers and sisters, *per stirpes*. Failing them—
5. The intestate's brothers and sisters of the half-blood and their issue on the like conditions. Failing them—
6. The four grandparents of the intestate or the survivors or survivor living at the death of the intestate. Failing them—
7. The uncles and aunts of the intestate of the whole blood living at his death and attaining majority or marrying, and the issue, living at the death of the intestate, and who attain majority or marry, of predeceasing uncles and aunts, *per stirpes*. Failing them—
8. The intestate's uncles and aunts of the half-blood and their issue on the like conditions. Failing them—
9. The surviving spouse, *i.e.* surviving at the death of the intestate. Whom failing—
10. The Crown.

The Act confers powers of application of income, advancement of capital, and for enabling the life-interest of the surviving spouse to be redeemed by a lump payment so as to accelerate distribution.

The outstanding features of the above scheme are :—

1. Abolition of primogeniture.
2. Abolition of the preference of males.
3. Absolute assimilation of the descent of the real and personal estates.
4. Absolute equality of the sexes, as regards both lines and individuals. Thus if grandparents succeed, all four are eligible concurrently and equally.
5. The preference of the whole blood to the half-blood, which is a novelty in England.
6. The special nature of the provisions for the surviving spouse, whether wife or husband.
7. Postponement of vesting till majority or marriage, but not till the expiry of life-interest, if any. This is quite a novelty in intestate succession.
8. Cutting off the succession of relatives at the issue of uncles and aunts.

The Intestate Husband's Estate Acts contain special provisions regarding domicile (Chap. VI.).

County Domicile.—The domicile of a deceased person determines the

court in Scotland in which confirmation may be granted. Where the deceased was domiciled in Scotland the application must be made in the sheriff court of the commissariot or county in which he had his domicile, and in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, in the sheriff court of Edinburgh.[1] In applying for confirmation, therefore, it is necessary to consider not only in what country, but also, if in Scotland, in what county, the deceased had his domicile, as it is only in the sheriff court of that county that confirmation is competent.[2] That is often a very troublesome question. Where the deceased has had a fixed residence in any county and in that county only, and dies while residing there, no difficulty can arise; nor even where the residence has been temporarily left with the clear intention of being resumed. But people frequently move about from county to county under circumstances which make it extremely difficult to say whether the change is temporary or permanent; or they leave Scotland altogether, and live in England, on the continent, or elsewhere abroad, without any intention either of abandoning Scotland as their home, or of returning to any particular county therein.

In these circumstances it has become the practice to distinguish between the national and the local domicile, and to hold that the former may be retained though the latter may cease to be fixed or known (*Meikle*, 27 Aug. 1866; *Lillie*, 19 Oct. 1869; *Smith*, 9 March 1870). Where a close connection is maintained with the family home, or a residence continues to be kept up, the county in which the home or residence is situated continues to be the domicile. Where also a person continues to own property formerly occupied as a home, that may be regarded as a link sufficient to maintain the local domicile.[3] But where the home or residence has been broken up, and no local tie remains,[4] and there is nothing to indicate in what county any permanent residence might be resumed, the case is held to be one of Scottish domicile, but as within the limits of Scotland, of floating or uncertain domicile,[5] and to come under the jurisdiction conferred by statute upon the sheriff court of Edinburgh, along with those cases where the uncertainty is not as to the county but as to the country of the deceased's domicile. In both cases the ground of doubt should be made to appear in the application.

International Questions: Nationality and Renvoi.—In the case of persons who have died domiciled in a foreign country a reference to the law of the domicile is sometimes apt to be confusing. This is because of two other principles which operate in many countries. The one is the substitution of nationality for domicile. The other is what is known as the doctrine of *renvoi*.

According to the law of Scotland it is legally possible for a man to

[1] 21 & 22 Vict. c. 56, ss. 3, 8; 39 & 40 Vict. c. 70, s. 35.

[2] *Dowie* v. *Barclay*, 1871, 9 M. 726.

[3] *Hamilton* v. *Hardie*, 1888, 16 R. 192.

[4] *Vincent* v. *Earl of Buchan*, 1889, 16 R. 637.

[5] *Arnott* v. *Groom*, 1846, 9 D. 142, *per* Lord Jeffrey.

remain a Scotsman and of British nationality and yet to lose any domicile in the United Kingdom and to be domiciled in any foreign country, say Italy. But then that is not the rule in many foreign systems of law; they substitute nationality for domicile. Thus the Italian code declares that "the status and capacity of persons and their family relations are governed by the law of the nation to which they belong." It is easy to see that great trouble may arise when a man, the subject of one country which makes domicile the test, is, according to the law of his nationality, domiciled in another country which makes nationality the test. Suppose a Scottish minor, retaining British nationality and allegiance, becomes, in the eyes of the law of Scotland, domiciled in Italy, and dies there at the age of fifteen, leaving a will purporting to dispose of real and personal estate, and made after he acquired the Italian domicile. The general law of Scotland is that a minor, as distinguished from a pupil, is competent to test upon personalty, but upon that only; it is understood that the general Italian law fixes nineteen as the age of testamentary capacity for all kinds of estate, and in any case that assumption illustrates the question. Is the will valid to carry personal estate in Scotland or anywhere? and the like question as to real or heritable property?

As regards real or heritable property the *lex situs* must rule; so one may dismiss the heritable question and confine attention to the proper subject of this book, viz. personal estate. Scots law looks to the law of the domicile, and therefore a Scots court would say that the will was ineffectual to carry personal estate in Scotland or elsewhere, because the testator had not attained the age (nineteen) of testamentary capacity according to the law of his Italian domicile. But then an Italian court would say that the will is valid to carry personal estate in Italy, Scotland, and elsewhere, because the Italian criterion is the law of the deceased's nationality, *i.e.* British law, which, in the case supposed, it is assumed must mean the law of Scotland. Thus Scots law refers to Italian law, and Italian law refers back to the law of Scotland. This is what is known as *renvoi*, and the real question is—what is the Italian law to which the Scots courts make the first reference? Is it the internal law of Italy applied there to Italian subjects, or is it that plus the specialty of external application by which foreigners are exceptionally treated? On one view the cross-references are interminable, and there is a suggestion of a *circulus inextricabilis*. The whole matter is one of very great complication, and, looking to the incidental nature of the treatment of the subject of domicile in this book, it may appear to be fitting and sufficient to rest satisfied with having drawn attention to the difficulty and to quote the latest English cases [1] (there appears to be none in Scotland). The solution of the puzzle adopted in *Re Johnson* was to ignore what we should call a domicile in a country which does not recognise domicile, and to give such a decision as would have been given if no domicile had been acquired in that country. What a judge of the latter country might do is another

[1] *Re Johnson. Roberts* v. *Attorney-General*, [1903] 1 Ch. 821; *Re Bowes*, 1906, 22 T.L.R. 711.

matter, and, obviously, not for this book, but it may be added that in *Re Johnson* Mr (afterwards Lord) Justice Farwell frankly recognised that a British judge and a foreign judge might apply different rules to the beneficial division of the estate: "If and so far as this court distributes his moveables they would be distributed according to our law; but if and so far as the courts in Baden distributed them, they would be distributed in accordance with Baden law." Neither on principle, nor in any other aspect, can this be considered a satisfactory result, and it is made worse by the further considerations that it is not clear that the substantial rights of parties might not be altered by transfers of estate from the one country to the other after the death, and that the doctrine appears to permit a scramble between the administrators in the two countries to reduce into their possession respectively assets which were in neither country at the time of the death.

Legalised Domicile.—There is also known to the law of some countries what is described as a legal domicile, to distinguish it from the ordinary domicile of private international law, which is for distinction called a domicile of fact. This came before the English court in 1906, in *Re Bowes*.[1] It there appeared that France admitted the principle of domicile, but not in the case of foreigners unless they had obtained French government authorisation. The testator was a British subject resident in France, and as we should say, domiciled there, but it had not been officially authorised. Mr Justice Swinfen Eady, following *Re Johnson*, held that the will was governed by the law of England. This again means that our law will not say there is a domicile in a country which says there is not.

Conversely, it would appear to follow, though it has not been decided, that if a foreigner, who is and remains a subject or citizen of a country the law of which substitutes nationality for domicile, comes to this country or goes to any other country which accepts domicile, and so acts as to fulfil the requirements of our law regarding the acquisition of a domicile here or in that other country, our law will hold that domicile has been acquired with all its legal effects, notwithstanding the contrary law of the country of his nationality.

These matters require very careful inquiry and consideration in many cases. The fact is that nationality has supplanted domicile in perhaps the majority of foreign countries. This applies to many European countries; and, further, special care is called for in cases relating to countries where Spanish law or some modification of it prevails. Even various publications which profess to state the law of, for instance, Cuba and South American countries are, it seems, to be read with caution. It is not uncommonly stated that in the case of foreigners their native law applies, even in the case of land, but then it may be found that, when the law of England or Scotland is thus appealed to, the answer is

[1] *Re Johnson. Roberts* v. *Attorney-General*, [1903] 1 Ch. 821; *Re Bowes*, 1906, 22 T.L.R. 711.

that our law is that the determination shall be referred back to the local law.

The following cases which have occurred in the Edinburgh commissary court are mentioned :—

Argentine.—*M'Tavish*, 9 Dec. 1873. Domicile there not enough without naturalisation ; therefore reference by Argentine law to the law of the deceased's nationality.

Peru.—*Irving*, 25 March 1881. Similar result.

Turkey.—*Smith*, 29 June 1877. British subjects, domiciled there, subject to law of " England."

It has been decided that the domicile which British subjects may acquire in foreign countries, within the jurisdiction of British courts established in those countries, is not such as to exempt their personal estates from the operation of the legacy duty Acts,[1] and is in other respects exceptional.[2] But these decisions are much shaken by the case of *Casdagli* in the House of Lords.[3] That case negatives the idea of the impossibility of a British subject acquiring an ordinary full domicile in an Eastern, civilised, non-Christian country, and leaves it a mere question of fact in each case, as if the residence had been in any other land, though the onus to show the change may be heavier.

[1] *Tootal's Trusts*, [1883] 23 Ch. 532. A.C. 431.

[2] *Abd-ul-Messih* v. *Farra*, [1888] 13

[3] *Casdagli* v. *Casdagli*, [1919] A.C. 145.

CHAPTER III

TESTAMENTARY WRITINGS

The testamentary writings upon which application for confirmation of executor-nominate are founded must be validly executed according to the law which regulates their validity. It will appear that in many cases there may be appeals to the laws of different places in the alternative.

But before going further on matters mainly applicable to contested cases, it is better to state the ordinary administrative procedure and

Practice. If on the face of the documents all the formalities of execution required by law have been complied with, and no one appears to object, no further evidence of validity is required. If these formalities have not been complied with, or if the execution is challenged, a proof will be allowed. By the Sheriff Court (Scotland) Act, 1877 (s. 11), when in any action competent in the sheriff court a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of a reduction. The practice, however, has been to hold that where the formal execution of the will is not challenged, or has been proved, and objection to its validity is taken on other grounds, the will cannot be set aside until it has been reduced. The executor named in the will may even in some cases insist upon confirmation though an action of reduction has been commenced. In a competition for confirmation between an executor-nominate and the next of kin, where the ground of challenge was that the will was fraudulent and *ultra vires* of the testator, although it was alleged that it was under reduction, the executor-nominate was preferred to the next of kin by the commissaries, and this judgment was affirmed by the court of session.[1] Where an application for confirmation by executors-nominate was objected to on an averment that the deceased died domiciled in England, and on the plea that therefore the will ought to have been proved there, and it was further averred that it was liable to reduction on the ground of incapacity and undue influence, it was held that no ground had been stated to justify the court in interfering with the granting of confirmation.[2] But where the question was as to the genuineness of a holograph writing, and the commissary had ordered proof, and decided that the writing was not genuine, this decision was affirmed by the House of Lords, without

[1] *Graham* v. *Bannerman*, 1822, 1 S. 362.

[2] *Hamilton* v. *Hardie*, 1888, 16 R. 192.

any question of competency.[1] A plea of *res judicata* founded on this decision was held by the court of session effectual to bar the reopening of the question by a party having a beneficial interest.[2] Where the ground of challenge was that the docquet of the notary by whom the will was executed was not holograph, and the commissary depute had held that, although there might be good ground for reducing the will, it afforded, while unreduced, a sufficient title *ex facie* for the appointment of executor, this view was repelled by the commissary, who found the will invalid; and on appeal the court of session adhered.[3] Where objections were lodged to confirmation being issued under a will which, it was alleged, was revoked by a subsequent letter narrating that it had been destroyed, the sheriff allowed a proof that the document founded on was a valid and subsisting will (*Glas*, 4 Nov. 1887). But where an executor-nominate in a petition for warrant to issue confirmation averred, and was prepared to depone, that the deceased died domiciled in Scotland, by the law of which the will founded on was validly executed, and an objector averred that the deceased died domiciled in England, by the law of which the will was invalid, and also that at the time of making it the testator was not responsible for his actions, the sheriff sisted the case for a month to allow the objector to bring an action of reduction, and, on the action being commenced, continued the sist until the action should be determined (*Munro*, 3 June and 19 July 1889); and the will having been reduced the petition was refused, and warrant was granted to issue confirmation under a will of prior date (20 June 1890). An application for confirmation by an executrix-nominate was opposed by the next of kin, who stated that an action had been commenced to reduce the will on the ground of incapacity and impetration, and the sheriff had sisted process. On appeal to the court of session specific averments were added impeaching the conduct and intentions of the executrix-nominate; and alleging danger to the estate. The court dismissed the petition for confirmation and appointed a judicial factor on the executry estate, reserving right to the petitioner to apply again in the event of the reduction failing and the factory being recalled. The Lord President indicated that these steps might not have been taken but for the amendment of the record. Note that the appointment of the factor was made in the commissary petition.[4]

Principle.—The general rule is that as regards personal estate a will is valid everywhere if valid by the law of the country where the testator was domiciled at the date of his death. But here we have something like the *renvoi* doctrine, for, when we appeal to the law of Scotland in the case of a person who dies domiciled here, we find that our law may refer us to some foreign law. This arises partly from our common law, partly by statute, and partly by the joint operation of common law and statute.

Common Law Extension.—It is the common law of Scotland that a

[1] *Anderson* v. *Gill*, 1858, 3 Macq. 180.
[2] *Ibid.*, 1860, 23 D. 250.
[3] *Henry* v. *Reid*, 1871, 9 M. 503.
[4] *Campbell* v. *Barber*, 1895, 23 R. 90; *Simpson's Ex.* v. *Simpson's Trs.*, 1912, S.C. 418.

will is validly executed, as regards personalty, if made in accordance with the requirements of the law of the place of signature.[1] Even this may not be so simple as it seems. It may not be capable of application, for the will may be signed at a place where there is no law. Further, it may mean not the ordinary internal law of the country of signature, but the law which the courts of that country would hold applicable in the actual case.[2]

Statutory Extensions: Wills Act, 1861.

1. The will of a British subject made *out of* the United Kingdom (without regard to domicile at its date or at his death) is, as regards personal estate, well executed if made according to the forms required by the law of (1) place where made; or (2) testator's domicile at its date; or (3) the part of the British dominions where he had his domicile of origin: to which the common law adds—or (4) testator's domicile at death.

2. The will of a British subject made *within* the United Kingdom (without regard to domicile at its date or at his death) is, as regards personal estate, well executed if made according to the forms required by the law of (1) that part of the United Kingdom where it is made. To which the common law adds—or (2) testator's domicile at death; and s. 3 of the Wills Act adds—or (3) his domicile at the date of the will.

These sections include a naturalised British subject.[3] The British allegiance must exist at the date of the will.[4] Under s. 1 the domicile of origin cannot aid if it was not in the Empire. In the case of aliens quære as to the effect of s. 17 of the British Nationality Act, 1914. These sections deal with formalities only and not with the substance of the will.

3. No will is to be revoked, or become invalid, nor shall its construction be altered, by any subsequent change of domicile. This extends to aliens.[5] It affects both form and substance. Quære whether it is limited to personal estate. Its full effect may not be at once apparent.

The idea is that if in this country the will would have been held valid if the testator had died immediately after executing it, it shall not be rendered invalid by any subsequent change of domicile. A common case is a holograph will made by a domiciled Scotsman who dies domiciled in England; *vice versa* as to a will made by mark. These wills are valid, as indeed they would be under s. 2 of the Act if the testators were British subjects. In short this s. 3 gives the alternatives of the law of the domicile at (1) date of will, or (2) death. And of course either of these may itself let in various alternatives, as our own law does, as has been shown. Section 3 was recently applied to the testamentary clauses of a marriage contract where the wife's estate, failing the matrimonial purposes, was destined to her "own heirs, executors, and assignees." Her domicile changed from Scotland to England by her marriage, but her heirs *in*

[1] *Purvis' Trs.* v. *Purvis' Exrs.*, 1861, 23 D. 812.

[2] *Re Lacroix*, [1877] 2 P.D. 96.

[3] *Gally*, [1876] 1 P.D. 438.

[4] *Von Buseck*, [1881] 6 P.D. 211.

[5] *Re Groos*, [1904] P. 269.

mobilibus according to Scots law were preferred to those claiming under her English domicile.[1]

The rules of the common law and of the 1861 Act go very far as regards formalities. Where they apply they take the document out of the narrower provisions of the Conveyancing (Scotland) Act, 1874, as to attestation of deeds and setting up deeds which have been informally executed.

It appears, however, that in all cases the law of the testator's domicile at death rules (1) his testamentary capacity, and (2) the legality of the substance of the will.[2]

The 1861 *Act in Operation.*—Where a will is founded on as valid under this Act, the facts necessary to bring it under the particular provision applicable to the case must be distinctly set out on oath by the executor (*Hamilton*, 21 Dec. 1872). Thus, in the case of a person who died domiciled in British Burmah, a holograph will was admitted to confirmation only on its being deponed to by the executor that the deceased was a British subject, and had his domicile of origin in Scotland, and that the will founded on was holograph and made out of the United Kingdom (*Webster*, 13 Nov. 1878). The Act involves the possibility of a conflict of laws even within the Empire as regards both administration and distribution. There are cases in which the persons authorised under the Act to administer in Scotland would not be recognised by the law of the domicile as having any title to do so. Confirmation has been granted in Scotland under a will, and in the same estate administration was granted in the court of the domicile as in an intestacy (*Strachan*, 24 Nov. 1880). Where a woman, whose domicile of origin was in Scotland, had become domiciled in New South Wales, and died leaving a holograph will executed there, naming executors, the courts of New South Wales, holding that by their law the will was invalid, granted administration to the next of kin. There being also estate in Scotland the administrator applied for and obtained confirmation as executor-dative *qua* next of kin, though he was also an executor nominated in the will, and might under the Act have obtained confirmation in that character. If the executor-nominate and the administrator had been different persons, and competed for confirmation, a question of nicety would have arisen (*Miller*, 7 Jan. 1890).

By the ordinary law of Scotland, wills must be either attested by two witnesses, or holograph, or adopted as holograph.[3]

Attested Deeds

By the Conveyancing Act, 1874, s. 38, it is enacted—

It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument,

[1] *Battye's Trs.* v. *Battye*, 1917 S.C. 385.
[2] Westlake, 119; Dicey, 721, 739.
[3] *Macdonald* v. *Cuthbertson*, 1890, 18 R. 101, *per* Lord President Inglis.

or writing, or in the testing clause thereof, provided that, where the witnesses are not so named and designed, their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves.

Under this section a will is probative and entitled to confirmation if it is signed at the end, and on each page or separate sheet; if two witnesses have attested the signature by signing at the end; and if the designations of the witnesses are mentioned either in the body of the will or in the testing clause, or appended to their signatures.

By the same Act (s. 39) it is enacted—

No deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested, was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the court of session, or to the sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses.

It will be observed that for commissary purposes any proof required may be taken in the commissary court, in the petition for appointment of an executor-dative, or in a special application to issue confirmation of an executor-nominate.

Under this section the only essential requisites are that the will shall be subscribed by the granter, and shall be attested by two witnesses subscribing. But if it is wanting in any of the formalities of execution not dispensed with by the previous section, it is not entitled to confirmation until it has been proved that it was subscribed by the testator and witnesses. Accordingly, a will written on more than one sheet, and signed only at the end by the testator and three witnesses who were not designed, was, on application to the court of session, after proof, found to be duly subscribed by testator and witnesses, the designations of the latter being given in the interlocutor; and an extract of the finding was produced in the commissary court along with the will, and founded on in the application for confirmation.[1] The remedy provided by this section was also found available to prove the execution of a writ wanting in the designation of the witnesses, after it had been exhibited and recorded with an inventory;[2] and also when a deed was partly written and partly printed,[3] but in that case no proof is required. And in a case where a will had been

[1] *M'Laren* v. *Menzies*, 1876, 3 R. 1151. See also *Addison, Petr.* 1875, 2 R. 457, and *Brown, Petr.* 1883, 11 R. 400.

[2] *Thomson's Trs.* v. *Easson*, 1878, 6 R. 141.

[3] *Nisbet, Petr.* 1897, 24 R. 411.

registered in the books of council and session, without the designations of the witnesses being added, and an extract was exhibited along with the inventory for confirmation, the sheriff allowed a proof of the due execution; and, on the evidence of the witnesses whose signatures were appended, held the will to be duly executed for the purpose of confirmation, and granted authority to issue confirmation in favour of the executor named therein (*Young*, 7 May 1920).

In short this 39th section covers any defect so long as the will has been subscribed by the testator and by actual real witnesses,[1] who subscribed in the testator's lifetime [2]; but by its terms it cannot apply to any holograph unattested writing.

General Rules.—A will may be written either in ink or pencil; [3] or it may be typed or printed, or any combination of these, or indeed any method of visible recording in words and figures may be adopted, *e.g.* the Braille system of writing for the blind (*Broadfoot*, 13 Nov. 1905). In that case the testator signed in ordinary writing and the signature was attested; with the inventory there were recorded the signed will, a copy in ordinary writing, and an expert's certificate. In England a will in shorthand has been admitted to probate.[4]

Signature by mark [5] is not sufficient by our law, but that must be taken subject to the important exceptions that a will of personal estate, executed out of Scotland by mark, is valid in Scotland if valid by the law of the place of execution, and in other cases, and even though executed *in* Scotland is valid if the testator was, at its date, or is at his death, domiciled in a country which recognises that method of execution. The same applies to the use of stamps [6] and cyclostyles.[7]

According to Scots law signature by initials will not do [8] unless this was the testator's usual method of signing.[9] The signature must be written, and not impressed by a stamp, but it is immaterial whether it is legible or not, and it may be sufficient though retouched by the testator after execution; [10] and in signing, the subscriber's hand may be held and steadied, but not led.[11] A signature, though imperfect or incomplete, has, if duly attested, been sustained (*Alexander*, 11 May 1885; *Rae*, 15 October 1886). A will with the signature of the testator written on an erasure, and *ex facie* attested by two witnesses, was sustained in respect the objector, on whom the *onus* was held to rest, had failed to prove either that the signature was not genuine, or that it was not duly attested.[12] Wills with

[1] *Forrests* v. *Low's Trs.*, 1907 S.C. 1240.

[2] *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75.

[3] *Muir's Trs.*, 1869, 8 M. 53; *Simsons* v. *Simsons*, 1883, 10 R. 1247; *Tait's Trs.* v. *Chiene*, 1911 S.C. 743.

[4] *Orrin* v. *Orrin*, Times, 20 Dec. 1921.

[5] *Crosbie* v. *Wilson*, 1865, 3 M. 870.

[6] *Stuart* v. *Crawfurd's Trs.*, 1885, 12 R. 610.

[7] *Whyte* v. *Watt*, 1893, 21 R. 165.

[8] *Gardner* v. *Lucas*, 1878, 5 R. (H.L.) 105.

[9] *Spiers* v. *Spiers*, 1879, 6 R. 1359.

[10] *Stuart* v. *Crawfurd's Trs.*, 1885, 12 R. 610.

[11] *Noble* v. *Noble*, 1875, 3 R. 74.

[12] *Brown* v. *Duncan*, 1888, 15 R. 511.

the testator's signature, not at the end but in the middle of the testing clause, which occurs frequently where a printed form is used, have been held duly signed (*Wood*, 16 Dec. 1921; *White*, 15 March 1922; *Cunningham*, 15 Feb. 1923). These administrative decisions may have been, and no doubt were, correct, because, for one reason, since the 1874 Act, no testing clause is essential; but it is a fundamental requirement that a will shall be, not only signed, but subscribed (see p. 34). A mutual will by husband and wife, signed by the husband before witnesses, and by the wife but not before witnesses, has been held valid as regards the husband's estate.[1]

The Witnesses.—The following are incompetent: (1) all persons, whether male or female, under fourteen years of age; (2) persons *non compos mentis*; (3) blind persons; (4) other signatories as principals to the same document. As to (5) persons interested, *e.g.* trustee or legatee, this is not a disqualification, nor does the witness forfeit his interest, though it may be an adverse element.[2] (6) No one may witness a party's signature "unless he then knows that party,"[3] but credible information is enough.[4] (7) It is thought now to be quite clear that a wife may witness her husband's deed,[5] but in testamentary cases it must almost always be extremely imprudent to let one spouse act as witness to the subscription of the other.[5] (8) A "casual, accidental, or concealed witness" is not competent. The witnesses must be "legitimately present and openly stand by and see what is done,"[6] and act as attesting witnesses by the testator's request, express or implied.[7]

The witness must either see the signature adhibited, or the testator must, "at the time of the witnesses subscribing, acknowledge his subscription."[8] The will may be subscribed in presence of one witness and acknowledged to the other, or acknowledged to both at different times.[9] Acknowledgment need not be in words.[10]

Witnesses are not allowed to sign by initials.[11] It appears that there has been something like an illegal laxity regarding the time at which the witnesses may sign. Certainly in the case of a will they may not sign after the testator's death,[12] for that would mean that intestacy at death was converted into testacy by something happening after death. The attestation by witnesses is not merely evidence: it is a solemnity.[12] Notwithstanding earlier cases[13] and practice, the only prudent course now is to see that the witness signs at once, and in the testator's presence, as

[1] *Millar* v. *Birrell*, 1876, 4 R. 87.

[2] *Simsons* v. *Simsons*, 1883, 10 R. 1247. But see Lord Ordinary in *Brownlee* v. *Robb*, 1907 S.C. 1302.

[3] 1681, c. 5.

[4] *Brock* v. *Brock*, 1908 S.C. 964.

[5] Lord Ordinary in *Brownlee* v. *Robb*, *supra*.

[6] *Tener's Trs.* v. *Tener's Trs.*, 1879, 6 R. 1111.

[7] *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75.

[8] 1681, c. 5.

[9] *Hogg* v. *Campbell*, 1864, 2 M. 848.

[10] *Cumming* v. *Skeoch's Trs.*, 1879, 6 R. 540, 963.

[11] *Gibson* v. *Walker*, 16 June 1809, F.C.

[12] *Walker* v. *Whitwell*, *supra*.

[13] Cited in *Walker* v. *Whitwell*, *supra*.

part of the same act as the testator's subscription or acknowledgment,[1] though it is not said that that is essential; but very little delay may be fatal.

Testing Clause.—Really no testing clause is now technically required even in the most formal will, except to specify the correction of errors in the document. Place and date, and the witnesses' names, have never been essential in any testing clause, and the witnesses' designations may now follow their signature, and may be added by anyone. It is understood that these designations may be added, or the ordinary testing clause filled in, not only at an interval, but even after the death of the testator [2] or the witness. But while the above is the technical position, it is extremely important that the whole should be completed with the least possible delay, and that place and date appear *in gremio*. These may come to be of great moment in any will, and it has been seen how essential they may be on questions arising as to the application of the Wills Act, 1861. The mention or assertion in the testing clause would not be conclusive, but the *onus* would be on the challenger.[3]

Notarial Execution

The 1874 Act granted facilities for the execution of deeds and wills notarially. Formerly a will could be subscribed for a person unable to write only by a notary public, or a parish minister, including the minister of a parish *quoad sacra* (but not his assistant) acting within his own parish.[4] But by the 1874 Act it was enacted that—

> Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter, who, from any cause, whether permanent or temporary, is unable to write, by one notary public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses. Such docquet may be in the form set forth in Schedule I. hereto annexed, or in any words to the like effect.

The docquet in the schedule is in the following terms:—

> By authority of the above named and designed A. B., who declares that he cannot write, on account of sickness and bodily weakness [*or*, never having been taught, *or otherwise, as the case may be*], I, C. D. [*design him*], notary public [*or* justice of peace for the county of (*name it; or, as regards wills or other testamentary writings executed by a parish minister as notary public in his own parish*, minister of the parish of (*name it*)], subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named

[1] *Walker* v. *Whitwell, supra.*
[2] Lord Dunedin in *Walker* v. *Whitwell.*
[3] *Young* v. *Paton*, 1910 S.C. 63.
[4] Erskine, 3. 2. 23; 7 and 8 Vict. c. 44, s. 8; *Hutton* v. *Harper*, 1876 (H.L.), 3 R. 9.

and designed, who subscribe this docquet in testimony of their having heard [*or* seen] authority given to me as aforesaid, and heard these presents read over to the said A. B.

E.F., *witness.* (*Signed*) C. D. Notary Public [*or* Justice of the Peace, *or* Parish Minister].
G. H., *witness.*

A docquet otherwise sufficient has been held not to be rendered invalid by its disconformity with the schedule.[1] Where the docquet bore that the deed had " been previously gone over and explained " to the granter, but not that it had been " read over " to him, the question whether it was validly executed was raised, but not finally decided.[2]

In practice the notary sometimes signs his own name at the end of the will before appending his docquet, less frequently the name of the testator, but neither appears necessary. The notary's docquet, and his subscription thereto, form the legal equivalent for the subscription of the testator (*Murray*, 24 November 1891).[3] The docquet must be holograph of the notary [4] or justice of peace [5] who signs it, and the defect cannot be remedied after the testator's death.[6] The 1874 Act gives no relief in these cases.[7]

The will is invalid if the notary is therein appointed trustee,[8] executor,[9] or law agent.[10] It is understood that a parish minister in the position of assistant and successor can act.

Holograph Wills

Subscription.—In view of its paramount importance the essential of subscription to a holograph (or any) will is mentioned at the outset. No *sub*scription, no will. Superscription will not do. The writer's full name at the beginning of the document, written by himself, will not do. If any of the following specialties constitute any exception or qualification of this rule they are probably bad law :—

1. It is not essential that the writing shall precede the signature in point of time, whether the new matter is introduced above [11] the signature or below it,[12] and the same subscription may serve for will and codicil.[12]

2. The subscription may be " indirect," *i.e.* by subscription of another unobjectionable writing connected by the testator with the unsigned writing ; the connection is the difficulty (see pp. 39–40).

3. The other " adoption " cases referred to on pp. 37–39.

[1] *Atchison's Trs.* v. *Atchison*, 1876, 3 R. 388.

[2] *Watson* v. *Beveridge*, 1883, 11 R. 40.

[3] *Mathieson* v. *Hawthorns & Co.*, 1899, 1 F. 468.

[4] *Henry* v. *Reid*, 1871, 9 M. 503.

[5] *Irvine* v. *M'Hardy*, 1892, 19 R. 458.

[6] *Campbell* v. *Purdie*, 1895, 22 R. 443.

[7] *Campbell, supra, Kissack* v. *Webster's Trs.*, 1894, 2 S.L.T. 172.

[8] *Ferrie* v. *Ferrie's Trs.* 1863, 1 M. 291.

[9] *Chisholm* v. *Macrae*, 1903, 11 S.L.T. 416.

[10] *Newstead* v. *Dansken*, 1918, 1 S.L.T. 136.

[11] *Gray's Trs.* v. *Wilson*, 1900, 3 F. 79.

[12] *Burnie's Trs* v. *Lawrie*, 1894, 21 R. 1015.

This whole subject, and a difficult application of the rules, came up in *Taylor's Exrxs.* v. *Thom*:[1]—

Holograph writing in closed envelope. On envelope, "my Will," unsigned. Writing commenced, "Sunnybank, Alford. My last Will, Jessie Taylor," and then followed directions disposing of whole estate. The question was whether "Jessie Taylor" was a subscription to a docquet of adoption of what followed. By bare majority of court of seven judges the writing was held no will. Common ground that *sub*scription is essential.

What is Holograph?—Though not attested, a will is valid by the law of Scotland if it is holograph of the testator. "Holograph writs, subscribed, are unquestionably the strongest probation by writ, and least imitable, but if they be not subscribed, they are understood to be incomplete acts from which the party hath resiled."[2] To enjoy the status of holograph it is not necessary that the whole be in the testator's writing; if the substantial or essential parts[3] are written by him, the rest may be written by another, or printed, typed, or otherwise produced. In the case of wills it is not a little difficult to apply this last rule to all of them. The question arises most naturally in the case of printed forms purchased by the intending maker of a home-made will. These forms are invariably prepared with reference to the law of England, and they assume that witnesses are to sign. The case of *Macdonald* v. *Cuthbertson*[4] shows how easily the intending testator fails of his purpose. In that case the testator had filled in the blanks quite intelligibly by stating his own name and designation, the name of the executor, the names of beneficiaries "equally and jointly, if one deceased to the survivor only," and the date, and he had subscribed. In the First Division under Lord President Inglis (Lord M'Laren dissenting) it was held no will, because the holograph words were not enough to give the essentials of a will, namely, words of gift and description of the gift. This case is in accord with a case[5] almost twenty years earlier, and it was followed in *Carmichael's Exrs.* v. *Carmichael*,[6] Lord Dunedin rejecting all the printed part, though in that case the holograph parts amounted to a will.

Mutual Wills.—A mutual will by husband and wife, in the handwriting of the former, is valid as regards his estate;[7] and so a mutual will, executed in 1870 by husband and wife before two witnesses, but in which the name of the writer was omitted, was held valid as regards the husband's estate, on its being deponed to that it was holograph of him (*Brown*, 28 May 1883); and the following will by husband and wife, written by the former:—"I, A. B., do hereby will and bequeath all that belongs to me at my death to my wife, C. D., and she does also the same to me, should such be, so that the longest liver gets all that belongs to either of us; witness our hand of writing, (signed) A. B., C. D."—was held valid

[1] 1914 S.C. 79.

[2] Stair, 4. 42. 6.

[3] Erskine, 3. 2. 22.

[4] 1890, 18 R. 101.

[5] *Maitland's Trs.* v. *Maitland*, 1871, 10 M. 79.

[6] 1909 S.C. 1387.

[7] *Macmillan* v. *Macmillan*, 1850, 13 D. 187.

as A. B.'s will (*Hunter*, 7 June 1883). A mutual will is effective as regards the estate of either party if executed in duplicate, each copy being in the handwriting of one of the parties and signed by both (*Jarvie*, 6 Oct. 1887). Also a mutual will signed by both, holograph of one and "adopted as holograph" by the other (*Kirk*, 21 Feb. 1902).

Proof of Holograph.—"Holograph writings ought regularly to mention that they are written by the granter, in which case they are presumed holograph unless the contrary be proved. But should this be neglected, a proof of holograph will be admitted either *comparatione literarum*, or by witnesses who saw the deed written and signed." [1] When the authenticity of a holograph writing is challenged, the *onus* lies on the party founding on it, and it is not enough to prove that the writ and the signature are in the same handwriting; it must be proved that both are written by the testator.[2] Where there was an obvious discrepancy between the handwriting and the signature in a will bearing to be holograph, confirmation was authorised only after proof that the deceased wrote two distinct hands, and that both the will and the signature had been written by him (*M'Donald*, 16 Dec. 1881). Generally, however, where the validity of a writing is not challenged, and it bears *in gremio* to be in the handwriting of the testator, it is accepted as *ex facie* valid, and entitled to confirmation, and the practice on this point has been sanctioned by the court of session.[3] This was very unwillingly, in deference to old practice, and under protest by Lord M'Laren that it "is an example of the familiar question-begging fallacy." His lordship denied that the rule (*i.e.* of the *prima facie* proof or presumption afforded by the assertion *in gremio* that the document is holograph) "has any application except as regards the non-contentious business of the commissary courts, . . . and judging from expressions of opinion which we have heard I should imagine that it has not many friends outside that ancient jurisdiction." Lord Adam apparently *contra*.

In regard to holograph wills which do not *in gremio* bear to be so, it was observed in the case last referred to that "before such a document can be held to be entitled to effect in any question of title or of transfer of property, it is clear that some evidence is necessary to instruct that it was truly the deed of the alleged granter—that is, that it is in his handwriting," and that "according to sound principle proof that the writing is that of the deceased should be required in such cases before confirmation is granted." [4] The evidence depends upon the circumstances. It has always been the practice to require the fact of a will being holograph to be set out in the executor's oath, but this is not now considered sufficient, and in addition an affidavit by two persons that the writing is holograph is required. The affidavit may be appended to the executor's oath or petition, but the simplest and most satisfactory method is by appending an affidavit to the will before registration, or to an extract [Form 11].

[1] Erskine, 3. 2. 22.
[2] *Anderson* v. *Gill*, 1858, 3 Macq. 180.
[3] *Cranston, Petr.*, 1890, 17 R. 410.
[4] *Per* Lord Shand, pp. 413, 414.

In applications under the small estates Acts the evidence can be included in the proof which the clerk may require to satisfy him of the applicant's title.

More than One Sheet.—There is no rule of law requiring that a holograph document, consisting of more than one sheet, shall be signed anywhere except at the end of the document. The 1874 Act would not aid, but it is not needed. This was emphasised and applied by the court in *Cranston.*[1] In that case a petition was presented for warrant to issue confirmation under a will of nine pages, written on three sheets of paper bookwise and unstitched, and expressly bearing to be written by the granter, the document being dated, but signed upon the last page only, and alleged to have been found in the testator's repositories exactly as it was produced with the petition. The sheriff-substitute allowed a proof that the whole writing was the will signed by the testator ; but an appeal was sustained on the ground that in such a case no proof was necessary. It was observed, however, that there might be " cases of detached documents not necessarily showing themselves to be parts of one writing, and therefore not necessarily authenticated by the signature at the end," and that in such cases proof would be required " that they formed one writing, including evidence, it may be, as to when the document or its alleged parts were formed, as bearing on the question whether the detached parts did form one whole." Though, therefore, a holograph will does not necessarily require to be signed on each page or sheet to entitle it to confirmation without proof, such as would be required in the case of an attested will, the question whether the integrity of the writing is to be inferred from the document itself depends upon the circumstances.

Illustrations—1. Writing on two pieces of paper found in the same envelope, one commencing with the name of the testator, but not signed, and the other signed by her initials, which was proved to be her usual method of signing, was held to constitute a valid will.[2]

2. A holograph will was written on two unconnected sheets, one sheet commencing with the testator's full name, but not signed, and the other sheet being signed. On the second sheet there followed a holograph signed codicil. Both sheets were found together in the private desk of the deceased. Warrant was granted to confirm the executor named therein (*Brown*, 29 May 1884). There could be no doubt about this after *Cranston's* case.

Date.—A holograph will is deemed to be executed on the date (if any) which it bears.[3]

Adoption

This is perhaps the best single word to cover a variety of cases of special privilege in regard to execution or the want of it, the kinds of things apt to occur and cause difficulty in commissary practice. Our law recognises the following: (1) Express adoption as holograph, by a

[1] *Cranston, Petr.*, 1890, 17 R. 410.
[2] *Spiers* v. *Spiers*, 1879, 6 R. 1359.
[3] 1874 Act, s. 40.

tested or holograph docquet, of another document which is neither, or which is unsigned; (2) implied adoption of such a document as just mentioned in another document which is subscribed and is tested or holograph; (3) express incorporation in like manner; (4) dispensation *ab ante*, in a duly executed will, with all formalities, including even signature, in future codicils. Of these four cases illustrations follow:—

Express Adoption.—In *Macdonald* v. *Cuthbertson*, *supra*, Lord President Inglis said:—

> If at the end of this [improbative] document there had been a writing, holograph of the deceased, saying, "I adopt the whole of the above, both printed and written as holograph, and declare it to be my will and testament,

that would have sufficed, though his lordship did not make it absolutely clear whether it would in his opinion have been necessary that the testator should sign twice. With deference it is submitted that one signature only, below the docquet, would be necessary, and that the docquet might be only "I adopt the above as holograph," or even "adopted as holograph."[1] In business matters, applicable even to heritage, the latter form is universal, and it is most unusual to sign twice.

In conformity so far with these views a warrant was granted to confirm executors named in a will, not in the handwriting of the deceased, but which she had signed, adding the words, "I adopt the above as holograph," and again signing her name, on an affidavit by two persons acquainted with her handwriting, that the words were holograph of the testator (*Adam*, 3 May 1890).

Implied Adoption.—Lord Sands describes this case as one "where the testator, wrongly thinking the first writing validly executed, validly executes a later writing in terms showing that he means the first writing to be acted on."[2]

Illustrations.—1. Improbative writing, followed by holograph writing beginning "I add to this." The improbative writing is effectual by adoption.[3]

2. Testator dictated a will appointing trustees and disposing of estate. He signed it and intended to have it attested to-morrow. Meantime he added on same sheet a very short codicil, holograph and subscribed, conferring powers and immunities on "my trustees." The will was effectual by adoption.[2]

3. Then below that first codicil he subscribed a further non-holograph codicil which was attempted to be set up by a holograph and signed letter to his solicitor enclosing the papers, but this failed.[2]

4. Validly executed will; invalidly executed first codicil; then second codicil validly executed ending by confirming will as altered by first codicil. The first codicil would be set up by adoption.

[1] Lord Guthrie in *Carmichael's Exrs.* v. *Carmichael*, 1909 S.C. 1387.

[2] *Cross's Trs.* v. *Cross*, 1921, 1 S.L.T. 244.

[3] *Macintyre* v. *Macfarlane's Trs.*, 1 Mar. 1821, F.C.

Express Incorporation.—It is submitted that the weight of authority is overpoweringly in favour of Lord Skerrington's dictum [1] that—

> A will, which is itself either holograph and subscribed or probative, may incorporate by reference unsubscribed testamentary directions which are to be found outside of itself—for example, in an unauthenticated writing sufficiently described for identification or in a model will printed on a certain page in a legal style-book or in the published life of some person either real or imaginary.

Multo magis this applies to non-holograph signed writings. The law of England is the same (p. 43). The difficulty lies in identification of the adopted document.

Dispensation ab ante.—This refers to the common practice in Scotland of inserting a clause in a formal will directing effect to be given to further informal writings or memoranda, sometimes "holograph though unsigned," or "whether signed or not," or "however informal." These at present receive effect, but there have been very grave questionings of the legality.[2] "Informal writings *under my hand*" has been held to cover a letter addressed to certain of the writer's children, subscribed "your loving mother," without more.[3]

Deposit Receipt, etc., Cases

Bank deposit receipts and other similar simple documents of debt present temptations to the constitution of home-made specific bequests. One risk is the identification of what is attempted to be bequeathed where the gift is not endorsed on the actual document. Another is the ambiguity between legacy and uncompleted donation when no testamentary language is used. Here we have no concern with donations either *inter vivos* or *mortis causa*.

Illustrations.—1. Bank deposit receipt in name of deceased found pinned to holograph signed writing, "The bill within this paper you will give"—then followed names of people with sums after each, adding up to the exact amount in the deposit receipt. Sustained as legacies.[4]

2. The depositor, Lewis Shedden, wrote on back of the bank deposit receipt "Mr Lewis Shedden i leave this to my sister Janet Shedden." This failed because there was no *sub*scription.[5]

3. Bank deposit receipt in deceased's name enclosed in sealed envelope on which was holograph writing, "Beatrice Burn Roberts from her father John Burn." Sustained as a legacy.[6]

4. Four IOU's found lying pinned together, enclosed in a letter from

[1] *Taylor's Exrxs.* v. *Thom*, 1914 S.C. 79.

[2] M'Laren, Wills, 3rd ed., 531; Lord Skerrington in *Taylor's Exrxs.* v. *Thom.*

[3] *Pentland* v. *Pentland's Trs.*, 1908, 16 S.L.T. 480.

[4] *Panton* v. *Gillies*, 1824, 2 S. 632, N.E. 536.

[5] *Goldie* v. *Shedden*, 1885, 13 R. 138.

[6] *Roberts* v. *Burn's Exr.*, 1914, 1 S.L.T. 509.

the borrower, which served as wrapper. On the back of that letter the creditor had written, holograph, "I don't want this money paid up," and signed. Sustained as legacy of release.[1]

5. Two acknowledgments of debt enclosed in envelope with holograph writing on it: "To my trustees. This is not to be opened but burnt," and signed. It was recognised that this might have received effect as a legacy of release, but special circumstances—viz. (*a*) subsequent formal will; (*b*) diminution of estate; and (*c*) pencil scorings across the writing on the envelope—led to inference of cancellation of the direction.[2]

6. Bank deposit receipt for £450 in name of deceased found endorsed by her, and with holograph signed writing pinned to the deposit receipt: "£150 to A. B. (*designed*), £150 to C. D. (*designed*), £150 to E. F. (*designed*)." Held no bequests, *dub.* Lord Johnston. One difficulty was that there was nothing express to show that what was intended was a legacy and that it was not a case of an uncompleted intention to donate *inter vivos*. Possibly the question was prejudiced by being presented in a special case, with no statement that it was the testatrix who pinned the writing to the deposit receipt.[3]

Envelope Cases

It is frequently attempted to be made out that a docquet and signature, or a signature only, on an enclosing envelope supply the absence of a signature on the enclosed holograph writing.

Illustrations.—1. Holograph unsubscribed writing was sustained as a will because (1) it was enclosed in a sealed packet addressed to nephew and with testatrix's signature; (2) attached to packet was an envelope bearing nephew's name and textatrix's signature; (3) in the envelope was a letter referring to having made her will, and the letter was signed "Your loving Aunt Margaret"; and (4) delivery of all these to the nephew, with verbal statement that the packet contained her will.[4] This case has been questioned.[5] The verbal statement would probably now go for nothing.

2. A holograph will beginning with testator's name, but not signed, was enclosed in an envelope inscribed "My Will," and this was signed. The will was held valid, and warrant to issue confirmation was granted on proof that the will had been found in the envelope in the deceased's repositories (*Wyld*, 27 Oct. 1887).

3. Holograph unsigned writing enclosed in envelope on which the writer signed his name was sustained as a will.[6] But quære after *Taylor's* case. Compare No. 5 below.

[1] *Mitchell's Trs.* v. *Pride*, 1912 S.C. 600.

[2] *Lennie* v. *Lennie's Trs.*, 1914, 1 S.L.T. 258.

[3] *Cameron's Trs.* v. *Mackenzie*, 1915 S.C. 313.

[4] *Russell's Trs.* v. *Henderson*, 1883, 11 R. 283.

[5] *Goldie* v. *Shedden*, 1885, 13 R. 138: *Taylor's Exrxs.* v. *Thom*, 1914 S.C. 79.

[6] *Murray* v. *Kuffel*, 1910, 2 S.L.T. 388.

4. *Taylor*, p. 35.

5. Unsigned holograph writing in sealed envelope signed across the gummed flap. No will.[1]

6. Holograph documents, unsubscribed, beginning with writer's address, and "Will and testemony of Joseph Stenhouse" (*date*), found in closed envelope on which was the following holograph. "Will and testemony of Joseph Stenhouse for ——" (name and address of solicitor). This failed for lack of subscription, though the writer's name appeared both inside and outside in his own writing.[2]

Testamentary or Deliberative

It is sometimes difficult to determine whether a writing is entitled to receive effect as a completed will, or whether it is merely deliberative.

Held Testamentary.—1. A signed holograph document headed "Heads by A. B. for his last will and testament" (*Tod*, 17 Jan. 1859).

2. The like headed "Notes of intended settlement."[3]

3. Draft will signed and attested about five years after received from law agents and retained till death a year or two later. Verbal statements that he had made his will.[4]

4. A document headed "Instructions to make a Will" was proved in England and resealed in Scotland (*Tennant*, 3 July 1867).

Held not Testamentary.—1. Paper sent to law agent: "I wish a codicil to be made in the following manner," going on to give distinct directions for disposal of property.[5]

2. List of names and figures without words of gift or any testamentary indications;[6] even though the word "will" occurs.[7]

3. "Memo to let (law agent) know I wish the bequest and name of A. to be erased from my settlement, and I do hereby desire it to be done." This was signed and found in repositories.[8]

4. Holograph document headed "Draft of a Codicil," and signed.[9]

5. Codicil marked "rough" (used by testator for "draft") holograph, dated, and signed, found in locked safe in sealed envelope, addressed to law agent, tied up with formal will. Testator made drafts of many documents, often signed them, and usually preserved them after the principals were dispatched. Other circumstances were special.[10]

6. Undelivered letter to law agent to burn certain testamentary writings. These were held not to be revoked.[1]

[1] *France's J. F.* v. *France's Trs.* 1916, 1 S.L.T. 126.

[2] *Stenhouse* v. *Stenhouse*, 1922, S.L.T. 259.

[3] *Hamilton* v. *White*, 1882, 9 R. (H.L.) 59.

[4] *Inglis' Trs.* v. *Inglis*, 1901, 4 F. 365.

[5] *Munro* v. *Coutts*, 1813, (H.L.) 1 Dow 437.

[6] *Lowson* v. *Ford*, 1866, 4 M. 631.

[7] *Brennan's Exr.* v. *Turner*, 1885, 22 S.L.R. 632; *Colvin* v. *Hutchison*, 1885, 12 R. 947.

[8] *Cunningham* v. *Murray's Trs.*, 1871, 9 M. 713.

[9] *Forsyth's Trs.* v. *Forsyth*, 1872, 10 M. 616.

[10] *Sprot's Trs.* v. *Sprot*, 1909 S.C. 272.

English and Foreign Wills

English.—Where the validity of a will falls to be determined by the law of England, and it bears to be signed by the testator and two witnesses, and has the usual attestation clause or docquet to the effect that the formalities of execution required by the law of England have been complied with, no further evidence is required, unless there is something on the face of the document to suggest defect or irregularity. The formalities of execution and attestation according to English law are fixed by the Wills Act, 1837 (1 Vict. c. 26), s. 9 :—

> No will (which includes codicil or other testamentary disposition) shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned ; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Although no form of attestation is necessary, if there is no attestation clause, or if there is a clause which does not state performance of all the prescribed ceremonies, an affidavit is required from one of the witnesses that the will was executed in compliance with the Act, before probate can be obtained ; but this may be dispensed with if the witnesses, after diligent inquiry, are not forthcoming. The following is an example of a complete attestation clause, and is that in common use :—

> Signed and declared by the above-named testator, as and for his last will and testament, in the presence of us, present at the same time, who, in his presence, at his request, and in the presence of each other, have hereunto set our names as witnesses thereto,—John Styles [*designation*], Richard Nokes [*designation*].[1]

Where a will is signed by a mark or by some person for the testator, the probate court requires to be satisfied by affidavit that the will was read over to the testator before execution, or that he at the time knew its contents (*Glendinning*, 27 Sept. 1889), and in such cases the fact of reading over ought to be set out in the attestation docquet on the will. Where an English will, not already proved in England, is presented for confirmation without a complete attestation clause, it is the practice to require, and to record along with it, an affidavit to the same effect as would be required by the English court (*Fyffe*, 31 March 1866 ; *Thomson*, 9 July 1874). [Form 12.] If the attestation clause of the will is imperfect, but a codicil has been subsequently executed containing a perfect attestation clause, no affidavit is required of the execution of the will [2] (*Simpson*, 20 Sept. 1887). If, however, there is anything in the appearance of the writing to suggest informality or irregularity in its execution, or any reason

[1] Williams, Executors, 11th ed., 68, 247.

[2] Tristram and Coote, Probate Practice, 15th ed., 28.

to doubt whether English law is applicable, evidence of validity may be required.

The adoption rule (p. 39) is recognised in England, to the extent of allowing the incorporation, in a duly executed will, of existing documents identified or capable of identification, whether signed [1] or not,[2] but not future documents.[3]

Foreign.—Where the validity of a will falls to be determined, neither by the law of Scotland nor by that of England, evidence of its validity requires to be produced. If the original will is exhibited, it must be accompanied by the testimony of a judge, notary, barrister, or other qualified person, that it is validly executed according to the forms required by the law which regulates its validity. No particular form of evidence is insisted on. It may be a judgment, an opinion of counsel, an affidavit, or a notarial certificate, according to the forms which may be in use in the country from which it comes [Form 13]. It will be observed that the first sentence of this paragraph implies that in commissary practice it is usual to refrain from putting parties to the expense of proving the law of England. That is so in all simple cases, and with that limitation it applies to other questions which may arise in addition to the validity of wills, *e.g.* the rules of intestate succession and the right to grants of representation. But when it appears expedient the line may be, and is, followed, as in the court of session, that even English law is in a Scottish court matter of fact, and must be proved. In all cases it must be averred.

If a will has been proved, or otherwise officially recognised as valid, in the courts of deceased's domicile, the probate or letters of administration with the will annexed, or an exemplification of these, or an official copy of the will under the hand of the registrar or other officer of court by whom it has been registered, and who has the original will in his custody, with a certificate by him that it has been proved or recognised as valid, are accepted as authentic copies of validly executed wills. A mere office copy, neither signed nor sealed, is not sufficient.[4]

The document produced from continental countries and from colonies or settlements planted by them, though now, it may be, under British rule, is usually neither the will itself, nor probate, nor an extract from the records of any court, but a notarial copy of the will, granted and authenticated by the notary with whom by law the original will must remain deposited. In those cases evidence is required, as in the case of an original document, that the will is validly executed, and also that the notarial copy is entitled to the same credit and effect as if it were the original [Form 13].

Documents from the courts of Great Britain or any British dominion bearing to be signed by the officials of those courts are received as genuine without further authentication, but documents from the courts of any

[1] *Boyle* v. *Thomson*, 1918, 34 T.L.R. 256.

[2] *Marchant*, 1893, Prob. 254.

[3] *Smart*, 1902, Prob. 238.

[4] *Stiven* v. *Myer*, 1868, 6 M. 885.

foreign State should be authenticated by a British consul or notary public resident there.[1] The certificate of the consul of a foreign state resident in this country has sometimes been accepted as evidence of the authenticity and effect of a document coming from that State [Form 14].

Documents in a foreign language must be accompanied by translations certified as correct. But a certified translation alone is not sufficient: the original will, or an authentic copy, must be produced, and it and the translation are both recorded (*Flahault*, 12 Jan. 1871; *Chauvin*, 20 April 1881).

Special Warrants.—Generally, as to the whole of the subjects dealt with in this chapter, it will be understood that many occasions arise necessitating the submission of the case to the commissary judge for his decision, even though there should be no contradictor. This is done by an application for special warrant to issue confirmation. Instances are: any informality of execution, unauthenticated deletions or additions, a discrepancy between the handwriting of different parts of an alleged holograph will, any ground for doubting the testamentary character of the document, or in the case of a foreign will any irregularity in its authentication or in the evidence of its validity [Forms 1–10].

[1] *Disbrow* v. *Mackintosh*, 1852, 15 D. 123; *Frizell* v. *Thomson*, 1860, 22 D. 1176; *Whitehead* v. *Thompson*, 1861, 23 D. 772; Dickson on Evidence, 3rd. ed., 1320.

CHAPTER IV

CONFIRMATION OF EXECUTORS-NOMINATE

THE person who in preference to all others is entitled to confirmation is the executor nominated by the deceased. Originally the office of executor-nominate was a beneficial appointment, but by the Intestate Moveable Succession Act, 1855, the right of the executor-nominate as such to retain any part of the estate for his own use was abolished. An executor-nominate is now, therefore, simply a testamentary administrator for all interested in the personal succession, but not for creditors (p. 4). Under the Trusts (Scotland) Act, 1921 (s. 2), every executor-nominate is a trustee.

The appointment of executor may be (1) express, (2) implied, (3) by construction under s. 3 of the Executors (Scotland) Act, 1900, (4) by assumption, or appointment by the court, as trustees.

Express.—The most common form of appointment is in these words: —"I appoint A. B. to be my executor"; or, in a trust disposition and settlement, where the estate has been conveyed to trustees by name, and to such person or persons as may thereafter be appointed or assumed as trustees—"I appoint my trustees to be my executors." "A man may quite competently appoint trustees or executors if he designates the persons sufficiently so as to identify them, even if the criterion of identification be another man's settlement," *per* Lord President Inglis in *Martin* v. *Ferguson's Trs.*[1] In that case no names were mentioned, but simply "the same trustees as my brother John."

Delegated Appointment.—An executor may be confirmed who has been appointed, not by the deceased, but by some one whom he has empowered to do so. Thus confirmation was authorised by the commissary, and issued, in favour of executors appointed in a deed of nomination executed by a beneficiary of the deceased, in virtue of a power to that effect contained in the will (*Hinds*, 11 March 1859). Where the deceased appointed A. as executor, "with power to name another if she sees fit,"—A. by deed appointed B., and both were confirmed (*Parker*, 10 Nov. 1881). In a case from Australia the testator by a will made and proved in Victoria appointed executors of his Australian assets, and empowered them to appoint executors of his estate elsewhere. The Australian executors appointed three Scotsmen to be executors of the

[1] 1892, 19 R. 474.

United Kingdom estate, and under special warrant confirmation was issued to the latter as executors-nominate (*MacGregor*, 6 Sept. 1900).

It is suggested that an appointment of two or more as " sole " executors is to be avoided.

Implied.—It was formerly the practice of the commissary court of Edinburgh to confirm as executors-nominate only persons upon whom that title had been expressly conferred. In the year 1833, however, a case occurred in which the testator had in his will left an annuity to his wife, and divided his estate among his children, and then added, " And for seeing this my will carried into effect, I hereby nominate and appoint A., B., C., and D., trustees for my wife and children." An application for confirmation of these trustees as executors-nominate having been refused by the commissaries in accordance with practice, the case was appealed, and the Lord Ordinary reversed, and remitted with instructions to grant confirmation.[1] Since then it has been the practice to confirm as executor-nominate any person upon whom, directly or by implication, executorial powers have been conferred, although not expressly named " executor."

It might perhaps be said that a statement that A. B. was " to see this will executed " [2] is an express appointment as executor. This was the point in the case of *Ross*,[3] where the expression was " to see this my will carried into effect." The appointment may be made by implication by conferring executorial powers without the use of any special terms, *e.g.* " judicial factor to carry out the purposes of this trust " ; [4] " I wish my estate to be managed " by persons identified by reference ; [5] " my dear brother if alive, and dear Robert will see to it " (*Blanche*, 11 Dec. 1911)—" to use for the benefit of my family,"—" to pay all claims,"—" to administer,"—" to carry these matters through,"—" to manage anything I may leave,"—" to dispose of my estate,"—" to see our will faithfully and honestly carried out,"—" to see to the due fulfilment of my wishes,"—" to take possession and divide,"—" to collect and divide,"—" to carry out the instructions of this will,"—" to have the entire management of my estate in every way,"—" to see all my business done." In all cases where the appointment is constructive a special warrant to issue confirmation may be required.

No Appointment.—In considering whether the office has been conferred, the whole scope and purport of the writing require to be taken into account. The following illustrations are given of cases where the claim to an implied appointment has been rejected, but some of these might now be affected by the Executors Act, 1900 :—

1. A legacy to " my executor, Mr T.," was held an insufficient nomination in competition with the next of kin, who was also liferentrix of the

[1] *Ross*, 9 March 1833, not reported.
[2] *Dundas* v. *Dundas*, 1837, 15 S. 427.
[3] 9 March 1833, not reported.
[4] *Tod*, 1890, 18 R. 152.
[5] *Martin* v. *Ferguson's Trs.*, 1892, 19 R. 474.

residue of the estate.[1] It was indicated that a reference to a man as executor may not have the same effect as an appointment of him as executor; but there was the separate point that it was not clear that the writing in question had not been superseded by a later will in which T. was not named. The decision is not uniformly followed in practice. In this case Lord Kinnear delivered the important *dictum*—

> I do not think that we have anything to do with the comparative capacity of the respective claimants to administer an estate; that is not a relevant consideration (see p. 78 as to bankruptcy).

2. A disposition in favour of A., B., and C. "for their exclusive benefit and use" was held to be simply an absolute conveyance, and the beneficiaries universal disponees (*Symond*, 27 April 1875).

3. "My cousin A. B. is to be my heir," followed by words which appeared to give the residue to a charity; held insufficient, and next of kin appointed though with no beneficial interest.[2]

Trustees.—Before the Executors Act, 1900, it was the authorised practice to regard testamentary trustees as constructively executors-nominate if a contrary intention did not appear.

Illustrations.—1. The brothers of the deceased had been decerned executors-dative *qua* next of kin. They produced with the inventory a will by the deceased containing an appointment of trustees. The decree-dative was recalled and the trustees were confirmed as executors-nominate (*Blair*, 30 Jan. 1877).

2. The testator appointed A. B. to be his executor and C. D. to be a trustee along with him: both were confirmed (*Strachan*, 27 Oct. 1873).

3. The testator appointed a number of persons to be his trustees but only one of them to act as executor: the executor expressly appointed was alone confirmed (*Ross*, 23 Jan. 1864; *Scott*, 28 Oct. 1882).

But the instrument must be testamentary. Thus on an application for special warrant confirmation as executors-nominate was refused to trustees and general disponees of the granter's whole estate as at the date of the (*inter vivos*) deed, though the estate was to be divided only on his death (*Smith*, 22 Oct. 1902). But it might be otherwise if the trust included the granter's whole estate, present and future, and if the only operative purposes had come to be of a testamentary and revocable nature, *e.g.* a wife's estate under a marriage trust when the proper matrimonial trusts had failed, though it is hardly probable that the additional title of confirmation would be important in such a case.

The 1900 Act.—The Executors (Scotland) Act, 1900, sanctioned the existing practice as regards the confirmation of testamentary trustees, and extended still further the right to confirmation as executor-nominate. Section 3 provides:—

> Where a testator has not appointed any person to act as his executor, or failing any person so appointed, the testamentary trustees of such

[1] *Denman* v. *Torry*, 1899, 1 F. 881. [2] *Jerdon* v. *Forrest*, 1897, 24 R. 395.

testator, original or assumed, or appointed by the supreme court (if any), failing whom any general disponee or universal legatory or residuary legatee appointed by such testator, shall be held to be his executor nominate, and entitled to confirmation in that character.

In applications for confirmation as executor-nominate by any general disponee, or universal legatory, or residuary legatee, it must be clear that the applicant is, according to the whole tenor of the will, entitled to the office claimed, otherwise the next of kin may fall to be preferred.[1]

It will be observed that someone is to be "held to be" executor-nominate when the testator "has not appointed" an executor; also that beneficiaries under even trust settlements may be confirmed as executors-nominate, but only "failing" the trustees, whether original or assumed. The failure may be by predecease, declinature, incapacity, or subsequent death, in which last case the confirmation may be *ad non executa* (*Forrest*, 9 March 1904). As to incapacity; a testatrix appointed three daughters and her son to be universal legatories, and the son to be sole executor; he was incapacitated by physical and mental weakness; two daughters declined executorship; third daughter was confirmed as sole executrix-nominate (*Forman*, 28 March 1904). The beneficiaries favoured by the section are confined to parties described as "*any* general disponee, or universal legatory, or residuary legatee." It does not admit of doubt that these very words are not essential if the character which they express is conferred. Further, at least as to general disponees, it is thought that it is not essential to that character that they shall be universal legatories, which, indeed, is almost express by the language of the section. It is of course certain that residuary legatees are not universal legatories, and it may be recalled that in the same will it is not uncommon to find two kinds of residue, special and general. In a case like that it is submitted that it would be difficult to exclude the special residuary legatee absolutely from the benefit of the section.

In connection with these questions it is to be kept in view that we are dealing with confirmation. On that ground it has been suggested that a restriction of the bequest to personal estate would not make the grantees any the less general disponees, etc., under the section, and that the same might be said of a restriction to personal estate in the United Kingdom or even in Scotland.

Illustrations.—Since the Act came into operation the following have been held in practice to be appointments as general disponee, entitling the appointee to confirmation as executor-nominate:—

1. Testamentary gift of "house with contents—and also all moneys which I may possess" (*Wilson*, 20 Oct. 1900).

2. "I leave to A. all that belongs to me in money and other things" (*Ferguson*, 28 Sept. 1900).

3. "Sole heir and legatee without reserve or qualification." Also "sole heiress"; a pupil; guardians appointed in same will: confirmation issued to pupil and the guardians (*Hermann*, 17 Sept. 1902).

[1] *M'Gown* v. *M'Kinlay*, 1835, 14 S. 105.

4. " Anything, either money or property, left at my wife's death " bequeathed to daughters: they were confirmed *ad non executa* as residuary legatees (*Forsyth*, 10 Sept. 1900).

And the following decisions may be added:—

5. " Belongings " and " possessions " each mean whole personal estate.[1]

6. Also " whole means and effects." [2]

7. Also " means and substance." [3]

8. Also " money," or " moneys," in the circumstances.[4]

9. " Whatever more money I leave " may be equivalent to general residue.[5]

10. Bequest of personal estate to A., " to be used by him for the term of his natural life "; no trust; and no other disposal of capital. A. is fiar.[6]

11. " All to my daughters." Five daughters; four declined; fifth confirmed (*Cowan*, 10 Jan. 1910).

12. " I leave all I possess to my husband, and after him to my sister "; husband held fiar and executor-nominate.[7] This case seems to imply that a liferenter would not be recognised as fulfilling the requirements of the section.

Two or More Beneficiaries.—In cases where s. 3 of the 1900 Act operates whether in favour of trustees or of beneficiaries or of direct grantees, it may happen that there are more than one. In that case it is necessary to remember that they are deemed to be executors-nominate. They are all entitled to confirmation, and each must accept or decline, or be otherwise accounted for, as if they had been expressly named executors [8] but one may in a proper case obtain decerniture as executor-dative (*Graham*, 25 Nov. 1921) *qua* one of the residuary legatees. Where the character is conferred, not on any persons by name, but on a class such as children, family, etc., the procedure is the same as in other cases of indefinite nomination (p. 55).

What is to happen in a case where A. and B. are expressly appointed equal " universal legatories," without survivorship or destination over, and the testator is predeceased by A. and survived by B. ? Is B. " *any* universal legatory " in the sense of s. 3 ? Would it make any difference if the words were " general disponees " or " residuary legatees " ? No attempt will be made here to decide these questions, but to them there may be added the further problems—whether the section would cover the improbable case of a will which from the start was confined to a

[1] *Macintyre* v. *Miller*, 1900, 7 S.L.T. 435.

[2] *Forsyth* v. *Turnbull*, 1887, 15 R. 172.

[3] *Maclagan's Trs.* v. *Lord Advocate*, 1903, 11 S.L.T. 227.

[4] *Easson* v. *Thomson's Trs.*, 1879, 7 R. 251; *Dunsmure* v. *Dunsmure*, 1879, 7 R. 261; *Taylor* v. *Tweedie*, 1922, 38 T.L.R. 850.

[5] *Keith* v. *Fraser*, 1883, 20 S.L.R. 785.

[6] *Lethem* v. *Evans*, 1918, 1 S.L.T. 27.

[7] *Reid* v. *Dobie*, 1921 S.C. 662.

[8] *Cowan*, *supra*.

bequest of "one-half of my whole estate," and whether the existence of an actual residue is essential to the character of residuary legatee.

Vesting.—Unless the bequest has vested in the intended general disponees, etc., it seems clear that they do not hold that character, and are not within s. 3 of the 1900 Act. When the gift is to a class, some may have a vested right and the others not, in which case it would appear that the former are entitled to confirmation. If the gift is vested, the mere fact that some of the class are in minority is no reason for excluding them; and even as to pupils, see p. 60. No opinion is hazarded on the question whether a right vested subject to defeasance would bring the beneficiary within s. 3.

Liferent, or Liferent and Fee.—It is not unknown to have a will which purports to create a liferent only and leaves the fee undisposed of, or the same result may come about owing to the fiar predeceasing the testator, and there being no destination over, or the fee may not have vested. In such cases a universal or residuary legatee in liferent may be entitled to confirmation. Where there is a gift in liferent and fee the fiar may be unknown or unascertained, in which case see s. 8 of the Trusts Act, 1921. But if that section is not put in operation, the liferenter may be within s. 3 of the 1900 Act, and entitled to confirmation. Usually in practice such cases would be met by the appointment of a judicial factor or new trustees, and it is understood that practice is altogether against the idea that the section can apply to a gift of anything but capital. It has been held that where there is a general conveyance to A. in liferent and B. in fee, B. alone is entitled under the section, and that his position is not destroyed or affected by the interposed liferent.

Derivative Titles, Etc.—The person, A., claiming confirmation of X.'s estate under s. 3 of the 1900 Act, may not be the original residuary legatee under X.'s will. This may happen in various ways, and whether the original residuary legatee, B., has or has not predeceased X. If B. predeceased X., B.'s children may take under the *conditio si sine*, or, apart from that altogether, there may be in X.'s will a destination over. If B. survived X. he may have taken a vested right and sold and assigned, or died, or he may have died before vesting and a destination over, or the *conditio*, may operate. A., claiming in any of these derivative or substitutional ways, is the residuary legatee when B. took no vested right, and in any case he stands in the shoes of the residuary legatee.

Where the claimant is the first person in whom the right vests, he is clearly within s. 3, though possibly an application for special warrant to issue confirmation may be required. Thus when the gift was to A. and his heirs, and A. predeceased, confirmation issued in favour of his heir as substitute general disponee (*Muir*, 23 March 1906; *Anderson*, 16 Oct. 1911).

When the original residuary legatee B. took a vested right and then sold to A., there is nothing to prevent B. being confirmed, and the confirmation will accresce to the title of the assignee A. If, however, B. has

died since assigning, A. is entitled to confirmation, but in practice it is held that this does not fall under s. 3 of the 1900 Act, and that A. must apply for a grant as executor-dative to X. the testator.

If B., the residuary legatee, took a vested right and died without selling, then double confirmation is required—namely (1) confirmation of A. as executor-nominate or dative, as the case may be, to the estate of B., including therein B.'s right to the residue of X.'s estate ; and (2) confirmation of A. as executor-*dative* to the estate of X. as his residuary legatee by succession.[1]

Non-Scottish Domicile.—The opinion has been expressed in Edinburgh commissary court that s. 3 of the 1900 Act applies only when the testator was domiciled in Scotland (*Jamieson*, 31 Oct. 1902). That was first laid down in the case of a New Zealand will appointing a universal legatory but no executor, and the New Zealand grant was of letters of administration with the will annexed. In these circumstances the Scottish court gave the equivalent of what the court of the domicile had given, namely, decerniture and confirmation as executor-dative *qua* universal legatory. The rule is now acted on (*Callander*, 17 April 1903). But it does not apply when the domicile was Scottish at the date of the will, for (p. 28) the construction of the will is not affected by change of domicile (*Bain*, April 1903), at least if the testator was a British subject.

Heirs and Representatives.—Difficult questions arise regarding the meaning of terms used in substitutions. It may suffice to give the following illustrations :—

1. A gift by will in certain events of one-half of the testator's estate to his brother, whom failing to the brother's "personal representatives." This was held to mean the brother's next of kin and not his executors-nominate or testamentary successors.[2]

2. Under a marriage contract, after a liferent to the surviving spouse, the estate was to go equally to "the representatives" of both spouses. This was held to mean executors-nominate, not next of kin.[3]

3. Testator authorised trustees to retain a share and apply it for the beneficiary's (A.'s) benefit ; no vesting ; and after A.'s death the balance if any to go to his "heirs *in mobilibus*." A.'s heirs *in mobilibus ab intestato* were preferred to his executors-nominate.[4]

4. Testamentary gift to A., or, if he predeceased the testator, to A.'s "executors and representatives whomsoever." His executor-nominate was preferred.[5]

5. Testamentary gift to A., or, if he predeceased the testator, to his "heirs, executors, and successors whomsoever." This gave the legacy to A.'s intestate successors and not his testamentary representatives.

[1] Bell's Prin., 1896.

[2] *Stewart* v. *Stewart*, M. *voce* Clause, App. No. 4.

[3] *Manson* v. *Hutcheon*, 1874, 1 R. 371.

[4] *Haldane's Trs.* v. *Sharp's Tr.*, 1890, 17 R. 385.

[5] *Scott's Exrs.* v. *Methven's Exrs.*, 1890, 17 R. 389.

This was said to be the general rule in the absence of specialty. Note the word "heirs." [1]

6. A.'s heirs fall to be ascertained as at A.'s death, notwithstanding that distribution may be much postponed, and even though this may have the effect, as under the ultimate clause in a marriage contract, of giving a fee to, *e.g.* a child dying in minority, when the prior clauses have declared that nothing shall vest in the child till majority.[2] But see Lord Atkinson in *Boyce* v. *Wastbrough*.[3]

Assumed and Nominated Trustees.—Where the trustees originally named would be entitled to confirmation as executors-nominate, any trustees whom they may assume, or whom the court may appoint as substitute trustees, are also entitled to confirmation as executors-nominate. Under this rule confirmation has been granted to the assumed trustees only, where the original trustees had resigned after assuming (*Thomson*, 9 Jan. 1900). Where the deceased by a holograph will directed that trustees be appointed "to see my will executed free from responsibility," but failed to make any appointment either of trustees or executors, and on an application to the court of session by the beneficiaries two trustees were appointed in terms of the will, warrant was granted by the sheriff to issue confirmation in favour of the trustees so appointed as executors-nominate (*Lee*, 7 Dec. 1889). In a holograph will disposing of his whole estate a testator made no express appointment of trustees, but nominated A., B., and C. to be his *joint* executors. This nomination having fallen by the declinature of one, an application was made for the appointment of trustees. The Lord Ordinary on 24 February 1874 appointed trustees with the usual powers, and they were confirmed as executors-nominate (*Fiddes*, 24 Mar. 1874). A testator conveyed his estate to his wife in liferent, and his children in fee, and appointed his wife to be his executor, so long as unmarried; with powers of management and disposal. There was no appointment of "trustees," and no power to assume. By a deed of assumption the widow assumed two of the children as trustees in whose favour, along with herself, confirmation was granted as executors-nominate (*Gow*, 9 Feb. 1880). In a mutual deed A. and B., spouses, nominated the survivor, and, on the death of the survivor, their four sons, to be their executors. On A.'s death B. assumed the four sons to act along with her, and the whole were confirmed (*Rutherford*, 9 April 1878). In these cases the executors were appointed not merely to realise and pay over the estate, but to hold it for the testamentary purposes.

Alongside of these cases it is useful to note also the following: Where the deceased had nominated A. to be her executor, and directed him to assume B. as a trustee, A. was confirmed alone on producing a declinature by B. (*Miller*, 17 April 1862). Where the testator, in a codicil, "wished and desired A. to be made a trustee," it was held that this was not an

[1] *Lady Kinnaird's Trs.* v. *Ogilvy*, 1911 S.C. 1136. To the same effect *Mackenzie's Trs.* v. *Georgeson*, 1923, S.L.T. 314.

[2] *Anderson's Trs.* v. *Forrest*, 1917 S.C. 321.

[3] 1922, 38 T.L.R. 483.

appointment, but a direction to assume, and that A. must be assumed unless he declined (*Lawson*, 1 April 1878). But when the deceased merely recommended her trustees to assume A., and they had not done so, they were confirmed alone (*Roy*, 4 Feb. 1863).

By the Executors Act, 1900 (s. 2), executors-nominate, unless the contrary be expressly provided in the trust deed, have the whole powers of trustees. Among the powers thus conferred on executors-*nominate* are those of resignation, of assuming new executors, and of acting by a majority. Where the executors are also trustees in the ordinary sense, the assumption will naturally be in both characters.

English Trusts.—The powers conferred by the Trusts (Scotland) Acts do not apply to English trusts.[1] Where the testator died domiciled in England leaving a trust settlement in the Scottish form, and a new trustee had been assumed under the Scottish Trusts Acts, and applied for confirmation, the application was objected to and abandoned (*Braund*, 25 Feb. 1891).

Revocation.—A nomination of executor may be held as cancelled otherwise than by an express revocation.[2] A trust deed dealing with the whole estate of a testator is held to revoke all previous testamentary writings (*Moncrieff*, 19 March 1883) ;[3] but in so far as they are capable of standing together, the earlier writings may be sustained along with a will of later date (*Cox*, 19 July 1893).[4] Where a testator in his will appointed certain parties to be his executors and universal legatories, and by subsequent writings withdrew the beneficial interest from all except one, while expressly confirming the will in other respects, it was held that the nomination of executors was not revoked.[5] But an appointment of a "sole executor" is held to supersede all previous appointments (*Horsburgh*, 13 Jan. 1868 ; *Wilson*, 16 May 1884) ; and where in a holograph writing the testator said : "I appoint A. to be my executor," confirmation was granted in favour of A. alone though three other executors had been appointed in earlier testamentary writings not expressly revoked (*Alexander*, 19 March 1860). A "desire" that a trustee's appointment be cancelled has been treated as equivalent to a recall (*Roberts*, 18 August 1870). Where the executor under a mutual will to which the deceased was a party applied for confirmation and produced also a will of subsequent date revoking all former wills and naming other executors, who, however, declined to accept, confirmation was granted only after the second will had been reduced as being *ultra vires* of the testator under the mutual will (*Banks*, 18 Sept. 1888). In a similar case, but where the second will contained no express revocation of the first, confirmation was granted to one of the executors under the first will on his finding substantial caution (*Trotter*, 28 July 1888). But where a husband and wife had executed

[1] *Brockie*, 1875, 2 R. 923 ; *Carruther's Trs. and Allan's Trs.*, 1896, 24 R. 238.

[2] *Mellis* v. *Mellis's Tr.*, 1898, 25 R. 720.

[3] *Sibbald's Trs.* v. *Greig*, 1871, 9 M. 399.

[4] *Tronsons* v. *Tronsons*, 1884, 12 R. 155.

[5] *Scott* v. *Peebles*, 1870, 8 M. 959.

a mutual will naming executors, and the husband, who survived, left another will disposing of the accumulations of his liferent, and naming separate executors, the latter were confirmed, on the executors under the mutual will renouncing all claim to the accumulations (*Mann*, 18 Oct. 1869).[1]

With reference to these mutual will cases the following quotation from Lord Shand [2] is to be noted :—

> There is one part of a mutual settlement which must always be revocable, and that is the provision for administration—the appointment of trustees and executors. I am of opinion that as regards his own estate it was competent to him to make a new appointment of trustees and executors.

Where an executor's name has been deleted and the deletion is not authenticated, the difficulty has been got over by production of a declinature from the person whose appointment was in doubt (*Conquér*, 16 June 1905), and this is the course generally followed. In a holograph writing the names of three executors had been deleted and three others interlined ; on renunciations being granted by the three whose names were deleted, confirmation was authorised in favour of the other three (*Cockburn*, 5 Jan. 1872). A testator had appointed A. and B. to be his trustees, and also to be his executors ; the names of A. and B. as trustees were deleted, but not their designations nor their appointment as executors ; on the will the testator had written " trustees now C., D., and E.," but without date ; the commissary held that the nomination of A. and B. was not effectually revoked, and granted authority to confirm A.,—B. being dead, —along with C., D., and E. on the application of the four (*Miller*, 14 June 1872). Where in a holograph writing the appointment of executor was written after the signature, objection was taken, and the executor named, who was also next of kin, expede confirmation as executor-dative (*Scott*, 2 Nov. 1887). But where in a will partly printed and partly holograph, and attested by two witnesses, there was inserted after the testing clause and above the signature " Sole trustee, J. W., Prestwick," also holograph, there being no other appointment of executor, confirmation as sole executor was authorised in favour of the person proved to be referred to as J. W. (*Lockhart*, 24 Oct. 1888).

Executors are frequently misnamed, or a portion of the name is omitted, or they are designed wrongly or insufficiently, or not at all. The procedure in such cases is regulated by the circumstances. Where the person intended to be appointed is otherwise sufficiently identified, any misdescription may be rectified by an averment in the oath ; but where this is not so, a special application must be made to the court, explaining the discrepancy or supplying the deficiency, and setting out the applicant's connection with the deceased, and the grounds upon which he avers that he is the person intended to be named ; and the sheriff, if

[1] See *Morris* v. *Anderson*, 1882, 9 R. 952 ; *Beattie's Trs.*, 1884, 11 R. 846 ; *Nicoll's Exrs.* v. *Hill*, 1887, 14 R. 384.

[2] *Martin* v. *Ferguson's Trs.*, 1892, 19 R. 474.

satisfied with or without a proof, grants warrant to issue confirmation [Forms 1, 5, 6].

Appointment of a Class.—The persons intended to be executors are generally named and designed in the will, but sometimes they are merely described as members of a class, or as possessed of some character as "heirs," "children," "family," etc. In these cases there must be specification, and if necessary proof, of the individuals embraced by the description, the whole of whom must be accounted for. This is done by petition to the court setting out the facts, and craving confirmation. Where a testator appointed his wife, "her heirs, executors, and assignees," to be his executors, the wife having predeceased, her children, as her heirs *in mobilibus*, were confirmed (*Lee*, 30 May 1859). And where the nomination was of "A. and heirs," and A. had died, leaving three children, one of whom was abroad, and his address unknown, and another declined, the third child was confirmed (*Reid*, 20 May 1873). In a mutual will by husband and wife they appointed as their executors, on the death of the survivor, "their respective next of kin." The next of kin being very numerous, and some of them abroad, one of them, with the consent of a majority of the others, was confirmed alone on his finding caution (*Robertson*, 25 Oct. 1862). In another case the deceased had written to her sister, "I request that you and your family may be executors of my will"; warrant was granted to confirm the sister's eldest son on declinatures being produced from her and all her other children (*White*, 24 June 1871). Where "the children who shall succeed" at the testator's death were appointed executors, warrant was granted to confirm those to whom the description applied (*Carrick*, 10 Dec. 1873); and where the terms of nomination were similar, but two of the children were abroad, warrant was granted on the application of four in this country to confirm two of the applicants (*Cotton*, 11 March 1875).

Nominations are not uncommon where the testator appoints parties in succession,—for instance, his wife, and, in the event of her predeceasing him, his "children in succession, if need be, from the eldest downwards;" in this case, the wife having predeceased, warrant was granted to confirm the eldest surviving child (*Bremner*, 17 March 1881).

Appointments ex officio.—In some cases the holders of certain specified offices are appointed executors along with other persons who are appointed by name, as, "A., B., C., and the president of the college of surgeons and rector of the High School *ex officio*" (*Sibbald*, 6 Jan. 1869); "A., B., C., and the senior magistrate of K. for the time being" (*Nimmo*, 30 Sept. 1874); "A., B., and C. and the present minister of North Esk Church and the present town clerk and their successors in office" (*Hall*, 3 Jan. 1889). In other cases they are appointed alone, as "J. M., general treasurer of the Free Church, or his successors in office" (*Tharp*, 27 Sept. 1878); "treasurer of Trinity Hospital for the time being" (*Skirving*, 7 Jan. 1880); "treasurer for the time being of James Gillespie's Hospital" (*Rutherford*, 2 June 1883). In such cases it is only the person in office

at the time confirmation is craved who is confirmed, and not also his successors in office, whose right to act emerges only on the failure of their predecessors.

Corporations.—Where the nomination is of a corporation the corporation itself is confirmed. Thus, confirmation has been issued in favour of "The governors of the hospital founded by the crafts of Edinburgh and Mary Erskine, and known by the name of the Trades Maiden Hospital," the inventory being given up and the oath made by the treasurer to the governors as specially authorised by them (*Scott*, 12 Sept. 1854); "The Lord Provost, magistrates, and council of the City of Edinburgh," the inventory being given up and the oath taken by one of the bailies (*Dick*, 31 Aug. 1866); and "The governors of James Gillespie's hospital and free school," the inventory being given up and the oath taken by the preses (*Sime*, 4 Nov. 1869). "The board of executors of Cape Town and G. R." were confirmed as executors-nominate under the will of a person who died domiciled in South Africa, on evidence that they had been authorised by the local court to administer (*Goldie*, 22 Oct. 1877). And "The Trustees, Executors and Agency Company, Limited, Melbourne," having obtained probate in Victoria, were confirmed, the oath being taken by an attorney in this country (*Macpherson*, 15 Nov. 1888).

Substitutes.—In the case of a direct substitution by the nomination of A., whom failing B., with no specification as to what is to constitute "failure," the substitution is held to take effect whether the failure of A. arises from death, declinature, or inability to act (*Morson*, 18 Feb. 1864). But where a testator nominated A., whom failing by his predecease, B., and both survived, it was held that B. could not be confirmed though A. declined (*Steele*, 15 April 1861). The nomination of a substitute executor is held not to take effect until his right to act emerges, and until then he cannot be confirmed. An application to confirm "A., whom failing B., C., and D.," was refused, and confirmation was issued in favour of A. alone (*Robertson*, 9 July 1863). A confirmation always proceeds on an inventory given up by the executors to be confirmed; and no executor can give up, or concur in giving up, an inventory for confirmation until he is entitled to act. Substitute executors under the Executors (Scotland) Act, 1900, have already been dealt with (pp. 50, 51).

Where in a trust conveyance there is a destination, failing the trustees, to the heir of the last survivor, this is held to be the heir at law and not the heir in moveables;[1] and warrant has been granted to confirm him accordingly (*Thomson*, 28 Nov. 1874). But a substitution can take effect only where the trust has come into operation and the trustees have acted. Where all the trustees had predeceased the testator, the appointment was held to have lapsed, new trustees were appointed under the Trusts Acts, and they were confirmed (*Roland*, 21 Feb. 1883).

Conditional Appointments.—Where an executor's right to act is made

[1] Alexander's Practice, 88.

contingent upon some event or circumstance, such as marriage, majority, or residence in Scotland, the facts showing whether the contingency has or has not occurred must be set out in a special application for confirmation. Where the right to act has not emerged the same rule is applied as in the case of substitute executors. No conditional nomination is given effect to unless the condition has been fulfilled. Thus a minor appointed to act only on his attaining majority is not confirmed unless he has attained that age (*Simpson*, 18 Jan. 1877). Where the deceased in his will named his eldest son who might be *sui juris* and resident in Great Britain at the time, the applicant had to set out the facts showing that he was the person who fulfilled the conditions (*Stewart*, 8 March 1877). An executor's right to act is frequently made conditional on his being resident in this country ; but he will not be excluded from the confirmation merely because the will gives a majority of the executors in this country power to act without him. Where a deceased named A. and B., but declared that either of them should be entitled to act alone when only one of them was in Great Britain, both were confirmed subject to that declaration repeated in the confirmation (*Key*, 11 Feb. 1880 ; *Allan*, 10 April 1884). And where a majority in this country was declared to be a quorum, and there were three in this country and three abroad, the whole were confirmed subject to the declaration (*Menzies*, 18 Dec. 1868). But where the nomination was in favour of three executors, " or any one or more of them who may be in Great Britain at my death," and one was abroad, the two others were alone confirmed (*Innes*, 9 Feb. 1882). Where three executors were named, but two of them had the sole right to act in the first place, and the third only on the death of one of the others, the two who were entitled to act at the time were alone confirmed (*Robb*, 13 March 1878). Where a testator appointed his wife, but if she should not be living at the time of his death, his children, and the wife survived and died without confirming, the nomination was held to have fallen, and one of the children was appointed executor-dative (*Cormack*, 12 Jan. 1883) ; and the same result occurred where the testator appointed executors in the event of his death before reaching New Zealand, and died after landing at Dunedin (*Lamont*, July 1883).

Limited Appointments.—Sometimes a condition limits the period during which the executor is entitled to act, *e.g.* a daughter while unmarried, and a widow during widowhood. Less frequent are appointments during the minority of children or beneficiaries. In all such cases the confirmation is granted subject to the limitation. A confirmation in favour of an executor *ex officio* is always limited to the time he holds office. Where a testatrix directed her trustees, whom she had appointed her executors, that in case of their number being by non-acceptance, resignation, or decease diminished to less than four, they should be bound immediately to assume such a number of trustees as would make up their number to four, the direction was quoted in the confirmation, and the executors were confirmed subject to the condition attached to their appointment as

trustees (*Clark*, 1 Dec. 1885). Where a testator appointed his wife and A. to be his trustees and executors, under the declaration that, if his wife remarried, her right to act should cease, and that then certain parties named should be assumed as trustees, the confirmation was limited accordingly (*Mason*, 23 April 1889).

Sine quo non.—Where one of a number of executors is appointed *sine quo non*, or *sine quo non* during survivance, the effect is to make it necessary that he should be a party to every act of executorship. In these cases the *sine quo non* should make oath to the inventory, and the confirmation is always granted subject to the condition, as a limitation on the right to act of the other executors. A petition for warrant to issue confirmation in favour of an executor-nominate, where another executor who had been appointed *sine quo non* had declined to act, was refused, and the next of kin were preferred (*Thomson*, 21 June 1881). Where the oath is taken by one of the executors other than the *sine quo non*, the consent of the *sine quo non* is required to the oath and crave for confirmation (*Maconochie*, 2 Oct. 1885); it may be in the form of a supplementary oath appended to the principal (*Govan*, 8 Sept. 1886).

Acceptors and Survivors.—Except where the contrary is expressed, the office of executor-nominate enures to the acceptors and survivors, so that an appointment does not fall so long as one of those named survives and acts.[1] This is implied in the case of executors-nominate as being trustees under the Trusts Act, 1921, and it is express in the case of executors-dative under s. 4 of the Executors Act, 1900. But the effect of an appointment as joint executors appears to be that if all do not act the nomination falls.[2] Where A., B., and C. were appointed joint executors, and C. declined, the nomination was held to have lapsed (*Fiddes*, 24 March 1874). Where a testatrix by her will appointed A. and B. "individually and jointly" to be her executors, and by a codicil appointed C. to act "in conjunction" with them or the survivor, A. and B. having both predeceased the testator, the nomination of C. was held to have fallen and confirmation in his favour was refused (*Kirby*, 13 June 1892). In cases of joint nomination the executors are confirmed in the same terms in which they are appointed (*Innes*, 25 Nov. 1887).

Partial Appointments.—Separate executors are sometimes named to manage different portions of the estate. This may be done by a testator making two wills, each dealing with a specified portion of his estate, and appointing a special set of executors to manage it; or it may be done in one instrument, by defining the estate to which the office of the respective executors shall apply. But that is not the effect when the testator appoints three executors in a formal will, and subsequently in a letter addressed to one of them (his son) says: "You will of course consider it

[1] *Gordon's Trs.* v. *Eglinton*, 1851, 13 D. 1381; *Findlay and Others*, 1885, 17 D. 1014; M'Laren, Wills, 3rd ed., 1660–1664.

[2] Stair, 1. 12. 13; M'Laren, Wills, 3rd ed., 1657.

prudent to sell the library as soon as possible." [1] The expedient of appointing two sets of executors is sometimes resorted to when a testator has estate in different countries. Where the whole estate in Scotland or in the United Kingdom falls to be administered by the same set of executors, the application for confirmation is in the ordinary form. But where the administration of the estate in this country is divided and apportioned, each portion must be distinguished in the inventory, and confirmation of each craved only in favour of the executors appointed to administer it; for, as there can be no partial confirmation of the estate in Scotland, the whole must be included in one confirmation. Where two wills dealt each with separate branches of the same estate, and contained a distinct nomination of executors, who, with one exception, were the same in both wills, the whole estate was given up in one inventory under different heads, and the confirmation limited the right of the executors to act to the estate specified in the inventory falling within the terms of their respective appointments (*Murray*, 2 Nov. 1861; *Muir*, 26 May 1886). Where there were separate executors for England and Scotland appointed in the same will, the estate in both countries was included in the confirmation, and the whole executors were confirmed, their right to act being limited in terms of their nomination (*Leslie*, 2 Dec. 1861). Where a special executor has been named to deal with one item of estate, confirmation has been granted accordingly (*Torrance*, 19 Feb. 1866; *Moore*, 10 April 1879). In these cases the inventory must be deponed to by two executors, one representing each branch of the estate, unless one of the executors happens to represent both. Where there are two deponents they may concur in the same deposition; or each may depone separately to the same inventory (*Brown*, 7 June 1886). Where a testator left two wills, and under the first a specific sum, "in whatever way invested," was conveyed, and executors were appointed to deal with it, but on the testator's death the item was so mixed up with other investments that it could not be distinguished, the executors appointed under the second will, to whom the rest of the estate had been conveyed, and who had been named executors, applied to the commissary, with consent of the executors under the first will, for confirmation of the whole estate in their favour, and this was granted (*Horsburgh*, 13 Jan. 1868). A testator bequeathed a specific legacy to X. and appointed him executor of the article in question; the legacy lapsed by X.'s predecease; it was held competent to the general executor to include the specific article in his confirmation, though it had been specially excepted from his appointment (*Cunningham*, 12 March 1877). Where special executors were appointed to deal with a certain portion of the estate, and they declined to apply for confirmation, on petition with their consent the general executors were confirmed to the whole estate (*Miller*, 2 March 1888). Where a testator who died domiciled in England left separate wills relating to his estate in Scotland and England respectively, with a different set of executors in each country, con-

[1] *Mackenzies* v. *Mackenzie*, 1886, 13 R. 507.

firmation to the estate in Scotland was expede by the Scottish executors, but they were required to exhibit a copy of the English will along with the inventory (*Simpson*, 20 Sept. 1887). And in a similar case, except that the executors under both wills were the same persons, the whole documents were proved in England, but the Scottish estate not being included in the probate, an inventory thereof was given up in Scotland, and the probate was recorded therewith (*Scarlett*, 23 Oct. 1888).

Married women who have been appointed executors may give up inventory and crave confirmation without being required to set out the consent of their husbands. This was the rule even before recent legislation, but where the appointment was exclusive of the *jus mariti* and right of administration, the exclusion was repeated in the clause of the confirmation narrating the appointment, but not in the clause conferring power to uplift and discharge (*Higgins*, 23 Dec. 1868), it being considered doubtful how far such a qualification was applicable in a fiduciary appointment.[1]

Minors and Pupils.—Where minors have been nominated executors without any suspension of their right to act while in minority, they may be confirmed on their own application, or on the application of their curators (*Houston*, 21 Sept. 1865); and where a testator had nominated his pupil son to be his executor, and in another deed appointed tutors and curators to him, the pupil was confirmed on an inventory being given up and confirmation craved in his favour by his tutors (*Bell*, 22 Nov. 1859). Where the sole executor and residuary legatee was a minor aged nineteen, warrant was granted to issue confirmation in her favour along with her father as her administrator-in-law (*Cunningham*, 18 Nov. 1885). In a small estate case confirmation was issued in favour of three executors-nominate, two of whom were in minority, the ages being specified in the oath to inventory and in the confirmation (*Hardie*, 20 Dec. 1888). And where in a will two minors and a pupil were named executors, and were also universal legatories, and one of the minors deponed to the inventory and craved confirmation in favour of the three, with consent of their father as administrator-in-law, confirmation was granted as craved (*M'Donald*, 2 Jan. 1890). Though confirmations in favour of minors and pupils are competent, they are, from their obvious inconvenience, not common, as the executors can discharge their duties only through their guardians, and not always even with the concurrence of their guardians (p. 77). Where a pupil was nominated along with a number of other executors, four of whom accepted, and a declinature by the pupil was produced, the commissary held that the pupil was unable personally to accept or decline, and could do so only through a curator or factor; but as there was a sufficient number of accepting executors to administer

[1] In regard to the liability of the husband where he does consent, *Pattison* v. *M'Vicar*, 1886, 13 R. 550. But he never now will consent unless his wife is a minor, when he is still curator.

the estate, and as the exclusion of the pupil would facilitate the administration, while his own interest was not exposed to any risk, the judge did not insist on the appointment of a factor, " whose duty it would so obviously be, on behalf of the pupil, to decline to act," and authorised confirmation in favour of the accepting executors (*Beattie*, 25 Nov. 1872). And on similar grounds, where the deceased had nominated his wife and child, the latter being a pupil, confirmation was authorised in favour of the widow (*Walker*, 9 March 1923). A declinature by a minor has been accepted (*Dewar*, 24 Jan. 1917).

For the reasons stated on p. 77 it is strongly recommended that grants in favour of pupils and minors should be avoided. A commissary factor can be appointed for pupils and minors in some testate cases (*Eddington*, 15 Jan. 1913), and then the grant may be to the factor only.

Insanity.—Where a person who had been appointed executor-nominate had become insane, it was held competent to issue confirmation in his favour on an inventory given up by his *curator bonis* (*Lumsdaine*, 21 April 1868; *Pattison*, 17 Nov. 1871). In both these cases the person named was the sole executor, and had a liferent interest in the estate. Where the executor was also universal legatory, she was confirmed on the application of her *curator bonis* (*Peterson*, 3 Oct. 1884). Where a sole executor had expede confirmation, and afterwards became insane, an eik to the confirmation was expede in the executor's name on the application of her curator (*Mailer*, 1 Nov. 1888; *Dodd*, 7 Oct. 1910).

Residence Abroad.—It is no objection to the confirmation of an executor that he is resident abroad. Though all the executors are out of the country, the oath may be taken by one of them, and confirmation is issued in the usual way. But when all the executors are abroad it is usual for them to grant a factory or power of attorney in favour of someone in this country, authorising him to give up an inventory, make oath thereto, and expede confirmation in their names. If it is desired that the factor or attorney should also proceed to realise the estate, powers to that effect are added. But it is the executors who are confirmed, not the factor or attorney [Forms 71, 67(11)].

Declinature: Resignation.—Confirmation has always been issued in favour of the whole surviving executors-nominate unless they decline to act. A declinature may be in the form of a minute or statement written on the will, a letter, or an excerpt from minutes of a meeting at which the declining executor was present and recording his declinature. Where an executor is unable to write, a declaration made personally to the clerk of court has been accepted. Where a trustee and executor has accepted, but has resigned before confirmation is applied for, a certified copy of his resignation must be produced. Resignation as trustee implies resignation as executor unless otherwise expressly declared.[1] It is not held to bar

[1] Trusts Act, 1921, s. 28.

the issue of confirmation in favour of the accepting and continuing executors that the period at the end of which it is provided that the resignation shall take effect has not expired.[1] What is wanted is evidence that the person named has had intimation of his appointment, and declines to be confirmed. Where four executors were named and two applied for confirmation, and deponed that the other two had declined, a minute of meeting at which all four were present, and at which the applicants had been authorised to obtain confirmation in their own favour, was accepted as evidence of declinature (*Menzies*, 3 Jan. 1861). An application by three executors for warrant to issue confirmation in favour of one of them, the two others declining to accept " in the meantime," was granted, nothing, however, being decided or reserved as to any subsequent application for confirmation by the non-acceptors, and no such application was made (*Mathison*, 2 April 1867). Where a widow had obtained decerniture as executrix-dative, and in giving up the inventory produced a will naming three executors, two of whom had declined, and the third was unaccounted for, the commissary refused to authorise confirmation without intimation to the latter, and a declinature was obtained (*Wright*, 28 Jan. 1867). Where, however, a judicial factor has been appointed, he is confirmed without being required to produce declinatures, it being presumed that the court has been satisfied as to the failure of trustees (*March*, 28 July 1869). But since the date of that case the law has been changed and a judicial factor does not require confirmation (p. 75). Where a trustee and executor accepted as trustee, but declined to act as executor, the declinature was received as sufficient (*Baird*, 30 Oct. 1883). A *curator bonis* may decline for his ward (*Macara*, 17 Dec. 1885). Where one of three executors named declined, but withdrew his declinature before anything had been done, he was confirmed with the others (*M'Queen*, 22 April 1890).

Where a person who has been named as executor is, from old age and infirmity, or from mental or bodily incapacity, unable to act or to grant a declinature, a medical certificate must be produced. Where an executor named has changed his residence, or has gone abroad, and his address cannot be ascertained, authority may be granted to issue confirmation in favour of the other executors. But where the absent executor has a beneficial interest, confirmation may be authorised only on caution being found to the extent of his interest (*Purvis*, 9 July 1863; *Templeton*, 10 March 1866). Even where the residence of an executor abroad is known, if it can be shown that the delay necessary to communicate with him in order to obtain his acceptance or declinature would be injurious to the estate, and especially if he has no beneficial interest, and it is considered probable that he will decline, and if there is a majority without him, the sheriff may grant warrant to confirm the others without waiting for his declinature. But where there were only two executors named, the sheriff refused to confirm one who was in this country without a declinature from

[1] *Fullarton's Trs.* v. *James*, 1895, 23 R. 105.

the other, who was in Madeira (*Norton*, 17 October 1876) [Forms 7, 8]. In really urgent cases communications by cable might prove useful.

English Law.—In England, and in countries subject to English law, it is the practice to grant probate to one or more of the executors, without notice to the others, power being reserved to make a like grant to the others if and when they apply ; the new grant, if applied for and issued, is termed a double probate. There is no such thing known as a double confirmation ; that is, a second confirmation of the same estate in favour of a different executor while the first is in force ; and power to make such a grant has never been reserved. A petition was presented by four accepting executors for warrant to issue confirmation in their favour, reserving power to two others who had not yet declared whether they would accept, " to apply for confirmation and to be conjoined in the executorship " with the petitioners on their accepting. Intimation of the petition having been ordered to the non-accepting executors, they personally accepted service, but did not enter appearance ; and the commissary depute granted warrant to issue confirmation " without the reservation prayed for," as not being in conformity with the invariable practice of the court. The petitioners appealed to the commissary. Counsel for the petitioners having explained that what was craved was merely that the non-accepting executors should not be barred from making application for confirmation afterwards if they thought fit, the commissary recalled the interlocutor and granted the petition on the ground that the reservation seemed of no importance, as the non-accepting executors would have the right to *apply* whether the reservation was made or not, and that nothing was decided as to the competency of granting such an application if made (*Stevenson*, 16 May 1867). No application under the reservation was ever made.

Where an application for confirmation is made by executors under an English will who have obtained probate in the court of the deceased's domicile, it is the practice to grant the application without requiring declinatures from any others in whose favour the power to make a like grant may have been reserved, though, of course, the whole executors named who have not renounced may be confirmed if they choose to apply. Even where probate has not been obtained, it is not the practice to insist on declinatures if it is shown that the law of the deceased's domicile would authorise the issue of probate to any one executor *primo venienti*. On this ground, where probate had been obtained in Australia in favour of one executor, and the court had reserved power to make a like grant to another resident in this country, the latter applied for and obtained confirmation in his favour alone (*Keillor*, 6 Jan. 1883 ; *Messer*, 30 May 1890), but in those cases evidence was produced of consent by the colonial executor.

Foreign Law.—In like manner where a foreign will contains an appointment of executors, confirmation as executors-nominate is granted in their favour, or in favour of such of them as have obtained or would be entitled

to apply for and obtain probate, or other similar administrative title, in the court of the deceased's domicile. Wills coming from countries where executors are not required seldom contain an appointment of executors, although in some cases an appointment may have been inserted with a view to the administration of estate in this country. Where such an appointment does occur it will be given effect to. If not, the beneficiaries may be within s. 3 of the Executors Act, 1900 (p. 47), failing which they must obtain decerniture as executors-dative in whatever beneficial character may be conferred upon them by the will (*Leslie*, 27 August 1863; *Guy*, 2 Feb. 1874). Under a French will, however, where the testator simply appointed her niece to be "legataire universelle," warrant was granted to issue confirmation in her favour on a certificate by a French notary that by the law of France she was entitled to the administration of the estate without surety or caution, and without being subject to the supervision of any court (*D'Abbadie*, 24 July 1901), and the like where in a French will there was an appointment of a "universal heir" (*Pirie*, 9 Dec. 1915). Where the deceased, who died in Edinburgh, domiciled in Germany, by his will provided that his wife should have the sole management of the estate during her widowhood, and evidence was produced that such an appointment according to the law of the domicile would confer upon the widow the sole administration provided she obtained the consent of a guardian for the children of the deceased appointed by a German court, such consent was obtained, and the widow was confirmed as executor-nominate (*Wagner*, 19 May 1886). It is understood that by the law of France testamentary executors require express power in the will to enable them to recover the funds of the succession, and where that power had not been granted a judicial administrator was appointed by the French courts, and he was decerned and confirmed as executor-dative (*De la Lastra*, 12 July 1889; *Delondre*, 25 March 1898).

By the law of England the office of executor transmits to the executor of a sole executor, or of a last surviving executor, who has obtained probate. Executors, therefore, in proving a deceased's will, become *ipso facto* executors of all estates of which the deceased who nominated them was the sole or last surviving executor, provided the grants of representation are all English.[1] In this way the chain of executorship may be continued *ad infinitum*, unless broken by intestacy or failure to take probate. This rule applies only to executors-nominate. There are, indeed, no other executors in England, whom we call executors-dative being known in England as administrators. Effect has frequently been given to this rule of English law in confirmation to personal estate forming part of an English succession, where the executors in England have died after probate, without confirming to the Scottish estate. The person who, according to the rule referred to, is entitled to continue the executorship has obtained confirmation in the same manner as if he were an assumed or substitute

[1] *Twyford* v. *Trail*, 1834, 7 Sim. 92.

executor (*Oddie*, 2 Aug. 1873; *Fulljames*, 18 April 1900). Where the deceased died domiciled in Canada, warrant was granted to issue confirmation *ad non executa* of the estate in Scotland in favour of the executor of an executor who had died after being confirmed, but before uplifting the estate, in terms of the Canadian will, and in accordance with Canadian law (*Bethune*, 18 Feb. 1886). The executors of the last surviving executor were also confirmed where the deceased had died domiciled in the colony of Victoria (*M'Allan*, 27 Oct. 1887).

CHAPTER V

CONFIRMATION OF EXECUTORS-DATIVE

Before dealing with more weighty matters it may be convenient to state, in this position of prominence, that in Edinburgh the initial writ must when lodged be accompanied by two plain copies; also that in Edinburgh the papers must be lodged by four o'clock on Thursday in order that the case may be in the roll of Friday, two weeks later.

In cases of intestate succession confirmation was formerly necessary, not only as an active title to recover the estate, but to vest the succession in the next of kin. But by the Act 4 Geo. IV. c. 98 (1823), it was enacted that thereafter—

> In all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expede, the right of such next of kin should transmit to his or her representatives, so that confirmation may and shall be granted to such representatives in the same manner as confirmation might have been granted to such next of kin immediately upon the death of such intestate.

The effect was that the beneficial interest vested in the next of kin at the death, and not, as previously, in those who were next of kin at the date of the confirmation.[1] The office of executor-dative therefore continued to be a beneficial appointment, to the extent of the executor's interest in the succession. But whereas formerly the beneficial interest of the executor-dative in many cases depended not only on his relationship to the deceased, but upon his having obtained confirmation, it now depends on the former alone, and he obtains confirmation not so much on the ground of kinship as on that of the beneficial interest which it confers. Propinquity alone, apart from interest, may still be admitted as a competent title.[2] Where the deceased has left heritage as well as moveables, and the heir in heritage is also one of the next of kin, he may be confirmed as executor without being bound to collate,[3] and the other next of kin cannot prevent his being conjoined with them in the office of executor (*Dennell*, 7 May 1888). On the death of the whole next of kin, the nearest surviving kindred at the time the office is applied for are entitled to the office, and it is no objection that they have no beneficial interest [4] (*Warrender*, 11 Jan.

[1] *Mann* v. *Thomas*, 1830, 8 S. 468; *Frith* v. *Buchanan*, 1837, 15 S. 729; *Elder* v. *Watson*, 1859, 21 D. 1122.

[2] *M'Gown* v. *M'Kinlay*, 1835, 14 S. 105.

[3] *Mitchell* v. *Macmichan*, 1852, 14 D. 318.

[4] *Bones* v. *Morrison*, 1866, 5 M. 240.

1884). But that is only when there is no competition. Recent practice proceeds on a disregard of mere propinquity in blood as a title to the office whenever it is brought into competition with a person having a beneficial interest in the succession.[1] At least *Webster's* case shows that a right of intestate succession is a title to share in the administration.

An appointment as executor-dative may be necessary, not only in cases of intestacy, but also where all persons who would have been entitled to confirmation as executors-nominate have died or declined to act or become incapable of acting, or where no such persons have been appointed. Any person having right to a share of the deceased's personal estate may then apply to the sheriff for decerniture as executor-dative. But this paragraph must now be taken as subject to s. 3 of the Executors Act, 1900, as to which, see p. 47.

Order of Preference.—In case of competition for the office, applicants are preferred in a certain order; but any one who is directly entitled to share in the succession may be appointed without special intimation to other persons having an equal or even a preferable claim to the office. All applicants having the same or an equal right in the order of preference are entitled to be conjoined; and any number of applicants, irrespective of the grounds of claim or the order of preference, may be conjoined of consent.[2]

The "Orders to be observed in the Confirmation of all Testaments," forming part of the instructions to the commissaries, issued in 1666 by the archbishops and bishops, with the authority of the supreme court, bear:—

> If there be no nomination or testament made by the defunct, or if the testament-testamentar shall not be desired to be confirmed, ye shall confirm the nearest of kin desiring to be confirmed; and if the nearest of kin shall not desire to be confirmed, ye shall confirm such of the creditors as desire to be confirmed as creditors, they instructing their debts; and if neither nearest of kin, executor, or creditor shall desire to be confirmed, ye shall confirm the legators,[3] such of them as desire to be confirmed and instruct that they are legators; and if no person having interest foresaid shall confirm, ye shall confirm your procurator-fiscal, datives always being duly given thereto before; and if after the said datives (but before confirmation), any person having interest shall desire to be surrogat in place of the procurator-fiscal, ye shall confirm them as executors surrogate in place of the procurator-fiscal.

It will be observed that in this enumeration there is no reference to the widow; but previous to the date of these instructions she had been held entitled to the office of executor-dative as a creditor in respect of her *jus relictæ*.[4] According to the older practice the general disponee, if he was not also nominated executor, was not entitled to be decerned executor-dative if either next of kin, widow, or creditor appeared to oppose him; but it was afterwards decided that he should be preferred to the office

[1] *Macpherson* v. *Macpherson*, 1855, 17 D. 358; *Webster* v. *Shiress*, 1878, 6 R. 102.

[2] *Muir*, 1876, 4 R. 74.

[3] *I.e.* legatees.

[4] Mor. Dict., *voce* Executor, 3843.

before any person not named by the deceased, on the ground that those to whom the deceased had given the only substantial interest in his succession ought also to have the right of administering if he has not expressly excluded them.[1] The order of preference then stood thus—(1) the general disponee; (2) the next of kin; (3) the widow; (4) creditors; and (5) special legatees,[2] *i.e.* legatees other than general disponees or universal legatories. This order is still maintained, though the character or title in respect of which the office of executor may now be claimed has been greatly extended, and certain statutory beneficiaries are held to rank along with, or immediately after, the next of kin, as to which see pp. 69, 70. When the whole net estate, heritable and moveable, does not exceed £500 (Scottish domicile, total intestacy, and no issue), the widow takes the whole and has an absolute and exclusive right to the office of executrix-dative. General disponees, universal legatories, and residuary legatees appointed by the testator being now entitled to confirmation as executors-nominate, only those who have become vested with these titles *by succession* require to be decerned executors-dative. Decerniture was given in favour of the representative of *one* of the universal legatories of the deceased (*Goskirk*, 15 March 1912), (p. 51) [Form 16].

Heirs in Mobilibus.—The order in which relatives succeed to the personal estate is—

1. Children and their descendants. Subject to (1) *jus relictæ* or *jus relicti*, and (2) *legitim.*

2. The widow in total intestacy cases where the whole net estate, heritable and moveable, does not exceed £500 (Chap. VI.).

3. Brothers and sisters of the full blood german (*i.e.* by the same father and mother) and their descendants. Subject to (1) the widow's preferential £500 (total intestacy only), and *jus relictæ*; or (2) *jus relicti*; (3) father's right to one-half, whom failing mother's right to one-half,[3] of the balance.

4. Brothers and sisters of the half-blood consanguinean (*i.e.* by the same father but by different mothers), and their descendants. Subject as in No. 3.

5. Father. Subject to (1) widow's preferential £500 (total intestacy only) and *jus relictæ*; or (2) *jus relicti.*

6. Mother.[3] Subject as in No. 5.

7. Brothers and sisters of the father, of the full blood, and their descendants. Subject as in No. 5, and subject also to the right of the brothers and sisters of the deceased, by the half-blood uterine (*i.e.* by the same mother but by different fathers) and their descendants to one-half of the balance.

8. Brothers and sisters of the father, of the half blood consanguinean, and their descendants. Subject as in No. 7.

[1] *Crawford*, 1755, Mor. Dict. 3818.

[2] Erskine, 3. 9. 32; Bell, Commentaries, ii. 78 (5th ed.); *Stewart* v. *Kerr*, 1890, 17 R. 707.

[3] Intestate Succession Act, 1919.

9. Paternal grandfather, whom failing his collaterals as in Nos. 7 and 8. Subject as in No. 7.

Representatives of the next of kin under the Act of 1823 are entitled to be confirmed in the same order of preference as the next of kin themselves. Although the beneficial right was by virtue of that Act held to vest in the next of kin immediately on the death of the intestate, so as to be transmissible by assignation or arrestment, the right to confirmation as an active title to intromit with the estate is not held to transmit until after the death of the next of kin. It has been laid down that the term "representative" must be "very liberally construed, and in a legal sense may include those who take by deed as well as by intestate succession." [1] Accordingly the term has been held to include all in whom any claim on the personal estate of the next of kin has become vested either by deed or by operation of law, and without any title having been established by confirmation to represent the immediate beneficiary as is necessary in testate succession. The privilege conferred by the Act has also been held applicable, not only to the immediate representatives of the next of kin, but to those whose claim arises by transmission. Thus where the next of kin was a married woman, and the beneficial interest had vested *jure mariti* in her husband, who predeceased her, a brother of the husband and one of his next of kin, was, on the death of the wife unconfirmed, decerned as her representative on her ancestor's estate, without having made up any intermediate title to his brother (*Bremner*, 2 Feb. 1883). It is hardly necessary to say that this right to obtain a direct title *per saltum* does not exclude any claim on the part of the revenue for duties on the intermediate successions [Form 29].

Statutory Successors.—*Father.*—By the Intestate Moveable Succession Act, 1855, it was enacted (s. 3) that where any person dying intestate should predecease his father without leaving issue, his father should have right to one-half of his moveable estate in preference to any brothers or sisters or their descendants who might have survived the intestate. The beneficial interest thus conferred upon the father entitles him to the office of executor-dative.[2] It was at the same time decided that, not the father himself only, but in the event of his death before confirmation his representatives, had the right to be conjoined along with the next of kin. This decision fixes the place of the father and his representatives in the order of preference, when claiming under this Act, *pari passu* with the next of kin and their representatives. Of course where there is no issue and there are no brothers or sisters, or their descendants, the father has the sole right to the office as the only next of kin [Forms 23, 36].

Mother.—By the Act (s. 4) where an intestate dying without leaving issue, whose father had predeceased him, was survived by his mother, she had right to one-third of his moveable estate in preference to his brothers and sisters or their descendants, or other next of kin of the

[1] *Mann* v. *Thomas*, 1830, 8 S. 468; *Frith* v. *Buchanan*, 1837, 15 S. 729.

[2] *Webster* v. *Shiress*, 1878, 6 R. 102.

intestate. This is now increased to one-half by the Intestate Moveable Succession Act, 1919; and when there are no issue, no brothers or sisters or their descendants, and the father has predeceased, the mother by the same Act takes the whole. The beneficial interest thus conferred upon the mother entitles her also to the office of executrix-dative.[1] In the case in which this question was decided there was no competition. The widow had also applied for the office, and by consent was conjoined with the mother. An opinion was indicated that, in the event of a competition with the next of kin, the latter might fall to be preferred. But looking to the grounds of judgment in the subsequent case of *Webster*,[2] the probability is that, in virtue of the beneficial interest conferred upon her, the mother and her representatives would be held entitled to rank along with the next of kin in the order of preference. There is great force in the reasoning in *Webster* that, when the 1855 Act intended that the new beneficial successors should be postponed in competition for the office of executor, it was expressly so stated, namely, in the case of descendants of next of kin competing with surviving next of kin [Forms 37, 38].

Brothers and Sisters Uterine.—By the 1855 Act (s. 5) where an intestate dying without leaving issue, whose father and mother have both predeceased him, does not leave any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but leaves brothers and sisters uterine, or any descendant of a brother or sister uterine, the brothers and sisters uterine, and their descendants in place of their predeceasing parent, have right to one-half of the intestate's moveable estate. In virtue of the beneficial interest thus conferred brothers and sisters uterine have been decerned executors-dative. In a competition it seems not improbable that they might be held, on the ground of their interest, to rank along with the next of kin [Form 39].

It will be understood that the rights of these statutory successors are subject to the widow's and husband's rights.

Representation in Moveables.—By the 1855 Act (s. 1) in all cases of intestate moveable succession, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased the intestate, the lawful child or children of the person so predeceasing come in the place of the predeceaser; and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, come in the place of his or their parent predeceasing, and respectively have right to the share of the moveable estate of the intestate to which the parent of the child or children, or of such issue, if he had survived the intestate, would have been entitled. But no representation is admitted among collaterals after brothers' and sisters' descendants. Further, the surviving next of kin of the intestate, claiming the office of executor, have exclusive right to it in preference to the children or other descendants of any predeceasing next of kin, but the children or descendants are entitled to confirmation

[1] *Muir*, 1876, 4 R. 74.

[2] *Webster* v. *Shiress*, 1878, 6 R. 102.

when no next of kin compete for the office [FORM 40]. It is not clear whether children of a predeceasing next of kin, although postponed to the next of kin themselves in the order of preference to the office of executor, are also postponed to those whom it has been decided that the Act intended to put on the same level as the next of kin ; for example, whether a father, while himself ranking with the surviving brothers and sisters of an intestate, in his claim to the office of executor, would also be entitled to exercise the right which the Act confers upon them of excluding the children of a predeceasing brother or sister from the office.

The right to representation conferred by this section of the 1855 Act, though it extends indefinitely in the direct line, is not admitted among collaterals " after brothers' and sisters' descendants." The brothers and sisters are the brothers and sisters of the intestate.[1] If the intestate leaves a brother or sister, and leaves also nephews and nieces by a predeceasing brother or sister, the nephews and nieces take their parent's share. In like manner if the next of kin are nephews and nieces, and there are also children of predeceasing nephews and nieces, the children take the share of their predeceasing parents, and are entitled to confirmation as children of predeceasing next of kin if the surviving next of kin do not compete. But where, for example, the next of kin are cousins-german, descendants of predeceasing cousins are excluded from the succession, for they are more remote than descendants of brothers and sisters of the intestate.[1] Being excluded from the succession they are, of course, also excluded from the office of executor-dative.

The character of " predeceasing next of kin " applies only where some other person in the same degree of relationship has survived the intestate. Thus if A. is predeceased by a brother, and survived by a sister, the brother is a predeceasing next of kin ; but if both brother and sister, though next of kin to A. while alive, predeceased him, they would not be predeceasing next of kin in the sense of the Act, and their children would take A.'s estate, not *per stirpes* and as children of predeceasing next of kin, but directly and *per capita* as themselves the next of kin to A. at his death.[2]

Suppose the brother, B., has nine children, and the sister, C., has one child. Estate £10,000. If B. predeceases and C. survives A. the intestate, B.'s nine children get £5000 among them and C. gets £5000. But if B. and C. both predecease, each of the ten children gets £1000.

By s. 9 of the 1855 Act it is declared that the words " intestate succession " mean succession in cases of partial as well as of total intestacy ; and that " intestate " means every person deceased who has left undisposed-of by will the whole or any portion of the moveable estate on which he might, if not subject to incapacity, have tested. Even where the deceased, therefore, has left a will of some kind, if there is any portion of his personal estate undisposed of by it, the provisions of the Act take effect, and the persons whom it may entitle to share in the estate will be entitled also in their order to the office of executor, failing an executor-nominate.

[1] *Ormiston* v. *Broad*, 1862, 1 M. 10. [2] *Turner and Others*, 1869, 8 M. 222.

In regard to the character in which persons claiming the office of executor under the Act should be decerned, opinions have sometimes been indicated that the term " next of kin " must now be considered applicable to those upon whom a right of succession to moveable estate has been conferred by the 1855 Act, as well as to those who succeed by common law. But it has been pointed out that in the Act itself the term " next of kin " is expressly maintained in its distinctive sense ; that " persons called to a share of the succession by the statute are not thereby made next of kin ; " and that " the term ' next of kin ' has never been used in the sense of including those who by statute are admitted to a share in the succession." [1] The practice in the commissariot of Edinburgh has always been to decern beneficiaries under the Act in the character in which they succeed, *qua* father, *qua* mother, *qua* brother uterine, *qua* child of a predeceasing next of kin, etc. : not *qua* next of kin in any case. Where the mother had applied to be decerned *qua* next of kin, it was held she was not entitled to the office in that character.[2] But the daughter of a predeceasing brother of an intestate, and as such entitled along with her surviving uncle to a share of the moveable succession, having been without opposition confirmed as executor-dative *qua* next of kin, in a reduction of the decree brought by her uncle it was held that, though the character of next of kin did not in strictness belong to the niece, the misdescription was not such as to nullify her confirmation, and reduction was refused.[3]

Surviving Spouse.—By the common law husband and wife did not share in each other's personal succession. The widow's *jus relictæ* she took, not as successor, but as creditor, and confirmation was not necessary to vest the right. But where the next of kin did not apply for confirmation, the widow was entitled to it as an active title to recover her *jus relictæ*. In the earlier cases the widow was decerned expressly *qua* creditrix, and it was on this ground that, while ranking for the office before ordinary creditors, her right to it was, and still is, held to be postponed to that of the next of kin [4] [Form 30]. This suffers exception when the widow takes the whole estate under the Intestate Husband's Acts, 1911–19, in which case she has an exclusive claim to the office of executrix (Chap. VI.).

As the husband could have no interest in his wife's intestate succession, it was held incompetent to decern him as her executor-dative. But by the Married Women's Property Act, 1881 (s. 6), the husband of any woman dying domiciled in Scotland takes the same share and interest in her moveable estate which is taken by a widow in her husband's moveable estate.[5] This confers on the husband a beneficial

[1] *Young's Trs.* v. *Janes*, 1880, 8 R. 242.

[2] *Muir*, 1876, 4 R. 74.

[3] *Dowie* v. *Barclay*, 1871, 9 M. 726.

[4] *Stewart* v. *Kerr*, 1890, 17 R. 707 ; *Scott* v. *Cook*, 1887, 3 Sh. Ct. Rep. 301 ; *Murray* v. *Murray*, 1888, 4 Sh. Ct. Rep. 129 (father preferred to widow).

[5] *Simon's Trs.* v. *Neilson*, 1890, 18 R. 135 ; *Buntine* v. *Buntine's Trs.*, 1894, 21 R. 714.

interest in his wife's succession, and it applies whether the marriage was before or after the Act.[1] Accordingly the husband, since the passing of the Act, has been decerned *qua* husband, in the same manner as the widow has been in use to be decerned *qua* relict [FORM 30].

But the husband is not entitled to be conjoined as executor with the wife's next of kin. The widow being postponed to her husband's next of kin it follows by parity of reasoning that the husband can be in no better position.[2] But of course the next of kin may waive their preference and let the husband in along with them or instead of them.

The husband's representatives come in his place. Assuming that he survived his wife he may since have assigned his *jus relicti* or he also may have died. In one case in practice (*Kennedy*, Paisley, June 1919) the husband survived his wife but died shortly after her, without any confirmation having been expede to her estate by any one. Her next of kin were a brother and sister, and the husband's next of kin was a brother. After consultation with the commissary office, Edinburgh, the course adopted was (1) to have the husband's brother, X., decerned executor-dative, *qua* next of kin, to the husband ; (2) to expede confirmation in favour of X. as the husband's executor, including, as one of the husband's assets, his *jus relicti* in his wife's estate ; (3) to have X. decerned and confirmed as sole executor-dative, *qua* representative of the husband, to the wife's estate, in respect of (4) a minute of consent by the wife's brother and sister, as her next of kin, lodged in the process, to X.'s decerniture as executor of the wife [FORM 32].

Aliens may be decerned as executors-dative. This holds even when this country is at war with their country, at least if the pursuer is resident in the United Kingdom.[3]

The Crown.—In cases where the Crown has any interest to interfere as *ultimus hæres*, the King's and Lord Treasurer's Remembrancer takes possession of the estate, however invested, without confirmation, pays the debts, and retains the balance, subject to such disposition thereof, if any, by way of gift or donation, as the Treasury may grant on an application made to them.[4] The donee, on certain conditions as to security, and under deduction of a proportion, varying from a fourth to a tenth of the estate, which is held to cover all duties which would have been payable on it as succession, obtains a deed of gift which constitutes a good title

[1] *Poë* v. *Adamson*, 1882, 10 R. 356 ; 1883, 10 R. (H.L.) 73. *Fotheringham's Trs.* v. *Fotheringham*, 1889, 16 R. 873.

[2] *Stewart* v. *Kerr*, 1890, 17 R. 707 ; *Campbell* v. *Falconer*, 1891, 19 R. 563.

[3] *Schulze*, 1917, 1 S.L.T. 176.

[4] Applications for gifts of estates fallen to His Majesty as *ultimus hæres* should be in the form of petitions to "The Right Hon. the Lords Commissioners of His Majesty's Treasury." The first petition should be forwarded to "The Secretary to the Treasury, London." All subsequent proceedings pass through the Exchequer in Edinburgh, and additional petitions and other papers should be forwarded to "The King's and Lord Treasurer's Remembrancer, Exchequer Chambers, Edinburgh," from whom all the necessary instructions as to procedure may be obtained.

to possess the estate conveyed by it, and also, it would appear, to recover any portion of the estate which may not have been uplifted or realised by the officers of the Crown. No confirmation, therefore, is required in Scotland; but where a part of the estate was situated in England, where administration even on the part of the Crown is necessary as a title, the donee obtained decerniture and confirmation, *qua* donee of the Crown, of the whole personal estate, including the part in England [1]; and the confirmation was sealed in England. This involved the payment of duty, which would otherwise have been unnecessary, the Crown having already made the usual deduction in lieu of duties.

Legatees include both special legatees, to whom a specific article or investment or debt has been bequeathed, and also those upon whom the deceased has conferred any limited interest, either of liferent or fee. But in certain cases s. 3 of the Executors Act, 1900, may enable the legatee to obtain confirmation as executor-nominate. Where the legatee dies after the legacy has vested, without having expede confirmation, his representatives, if they are to administer the testator's estate, require in the first place to confirm to the legatee, and thereafter to the testator as legatee by succession.[2]

Judicial Factor.—By Act of Sederunt, 13 Feb. 1730 (which, although its provisions were by s. 12 extended to all judicial factors thenceforth to be appointed by the Lords of Council and Session, relates primarily to factors on the estates of pupils not having tutors, and of persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates), it is provided that where it is necessary by law that the money or effects or moveables falling under the factory should be confirmed, the factor "may confirm the same in his own name as executor-dative and as factor appointed by the lords of council and session on the estate of such a person and for the use and behoof of the said person and of all that have or shall have interest, unless some other person having a title offers to confirm." This provision is applicable also to judicial factors appointed in the sheriff court.[3] It evidently contemplates and provides for the case of a factor who is appointed, not on the estate of the deceased, but on the estate of some person having a beneficial interest in the deceased's succession, such as a *curator bonis*, or factor *loco tutoris* or *loco absentis*, to the next of kin.[4] A tutor-at-law to the children of the deceased is also entitled to confirmation in his own name (*Ritchie*, 22 May 1856) [Form 44].

It was formerly considered matter of doubt whether a judicial factor appointed on the estate of the deceased required to complete a title by confirmation. Generally, his appointment as factor was found to be sufficient, but confirmation was considered not incompetent, and was

[1] In the sheriff court at Stonehaven, *Galbraith*, 19 Feb. 1889.

[2] Bell, Principles, 1896.

[3] 43 & 44 Vict. c. 4 (4).

[4] *Whiffin* v *Lees*, 1872, 10 M. 800.

sometimes resorted to as a convenient means of showing that death duty had been paid; and if any of the estate was situated in England or Ireland, where his title as factor might not be recognised, it enabled him as executor to obtain possession of it. The Judicial Factors (Scotland) Act, 1889, removed all doubt, though the factor may still be decerned executor and obtain confirmation if he desire it. Apparently there is this difference that, in the absence of decerniture and confirmation, the title of administration ends with the factory, whereas the added title of executor confirmed may not.[1] Whether he applies for confirmation or not, the judicial factor requires to give up an inventory and pay the duty, though he may do this, as he always could, as factor without being decerned executor. A judicial factor under the Bankruptcy Act is entitled to object to the decerniture of an executor-dative *qua* next of kin, on the ground that the appointment would conflict with his own office, the powers and duties conferred upon him being such as to entitle him to the sole administration of the estate (*Sutherland*, 16 April 1880). But where a judicial factor had been appointed in the sheriff court without due inquiry, the court of session recalled the appointment at the instance of a next of kin who had been decerned executor-dative.[2] Whether the administration should be in the hands of an executor or of a judicial factor is a matter in the discretion of the court. Where an estate consisted of heritage and moveables, and its solvency was doubtful, the court preferred the factor who had been appointed at the instance of the heritable creditors.[3]

Sequestration.—The title of a trustee in the sequestration of a deceased debtor sequestrated after his death enables him to ingather the estate without confirmation as executor, but where the trustee had realised the estate, and after paying debts there remained a surplus in his hands, the court of session directed that confirmation should be issued in favour of the next of kin in order to uplift the surplus from the trustee.[4]

Procurator-Fiscal.—Confirmations in favour of the procurator-fiscal of the commissariot of Edinburgh have not been frequent in recent years. In a case where a deceased person had left considerable personal estate and no executor-nominate or next of kin applied for confirmation, the procurator-fiscal was, at the instance of persons having claims against the deceased, decerned and confirmed as executor; he thereafter realised the estate, and it having been ascertained that the deceased was illegitimate, and had never been married, the estate was handed over to the Crown (*Grant*, 29 Dec. 1870). In this case the opinion of Crown counsel had been obtained in favour of the competency of the procedure. Every petition for the appointment of the procurator-fiscal of court as executor-dative should set out the parties at whose request, and the circumstances under which, it is presented; and wherever it appears that the deceased

[1] *Johnston's Exr.* v. *Dobie*, 1907 S.C. 31.

[2] *Cuthbertson* v. *Gibson*, 1887, 14 R. 736.

[3] *Masterton* v. *Erskine's Trs.*, 1887, 14 R. 712; *Campbell* v. *Barber*, 1895, 23 R. 90.

[4] *Bell* v. *Glen*, 1883, not reported.

has died without any known legal representatives, and that the Crown may have an interest as *ultimus hæres*, special intimation must, under an order by the commissary, dated 28 May 1872, be made to the King's and Lord Treasurer's Remembrancer.

Married Women may be decerned and confirmed as executors-dative, and the husband's consent is not now necessary unless the lady is in minority.

Pupils and minors may be decerned and confirmed as executors-dative either in their own names or along with their legal guardians, on an application at their instance with the consent and concurrence of the guardians,[1] but in the case of pupils the application ought to be in name of the guardian. It is thought that the dictum by Lord M'Laren in *Johnston* [2] is not adverse to this, and in any case it was *obiter*. An application by a father to be decerned executor-dative *qua* administrator in law for two of his pupil children on the estate of their mother was refused, and the pupils themselves were decerned executors-dative *qua* next of kin, their father being decerned along with them as their administrator in law, " in respect that the practice had been to decern pupils and minors, and not their fathers as their administrators in law, executors to defunct persons, and that no sufficient reason had been assigned for the present motion to deviate from that practice " (*Fletcher*, 24 and 31 Dec. 1852). Where the father is dead, but has appointed tutors and curators to his children, they also may be decerned and confirmed along with the children (*Laing*, 8 Sept. 1854; *Cadell*, 2 May 1861). But pupils and minors may be decerned and confirmed alone, the oath to the inventory being taken by the administrator (*Drummond*, 11 Feb. 1876) or curator (*Thomson*, 14 June 1878), though a minor may also make oath to an inventory (*Leyden*, 22 April 1882) [Forms 41–44].

Commissary Factors. When the applicant for confirmation was a pupil or minor without any legal guardian, the commissaries were in use to appoint a curator or factor, with power to act for or with him as executor, and the practice was sanctioned by the court of session.[3] The usual practice in the commissariot of Edinburgh is to appoint the factor in the first instance, and he is thereafter decerned and confirmed as executor-dative *qua* factor. But it is equally competent first to decern the minor or pupil as executor-dative, and then to appoint the factor with power to give up inventory and expede confirmation in his own name as factor. A third method is first to appoint the factor, and then to decern and confirm the minor and the factor along with him. This last method has the advantage that, in the event of the administration of the estate not being completed before the minor has attained majority, his own title to act emerges without a new appointment (*Rae*, 17 Jan. 1889).

[1] *Reid* v. *Turner*, 1830, 8 S. 960; *Keith* v. *Archer*, 1836, 15 S. 116.

[2] *Johnston's Exr.* v. *Dobie*, 1907 S.C. 31.

[3] *Johnstone* v. *Lowden*, 1838, 16 S. 541.

But an appointment *qua* factor for minors does not lapse on the minor attaining majority, or dying.[1] A factor may be appointed for a minor who is universal legatory, as well as for one who is next of kin (*Eddington*, 15 Jan. 1913). Where the deceased died domiciled in England, a factor was appointed for his minor children, the widow having renounced, and the only next of kin *sui juris* being in New Zealand (*Roy*, 22 March 1877). The application for the appointment of factor is at the instance of the children themselves, and of their nearest relatives both on the father's and mother's side, so far as can be ascertained. The office has always been considered gratuitous, and is conferred on some near relative of the children, whom the sheriff may consider a fit and proper person to entrust with its duties. The factor must reside in Scotland (*Chafford*, Dec. 1867),[2] and must find caution as factor before being decerned executor, and also as executor before being confirmed. Commissary factors are now held to be subject to the supervision of the accountant of the court of session under the Judicial Factors Act, 1889, and the factor's bond is transmitted to the accountant on his appointment. Where the father was a foreigner, and the child was in this country with its maternal relatives, one of the latter was, on the father's application, appointed factor to the child (*Palumbo*, 14 July 1870). It is not usual to appoint a factor for children on the estate of their father when there is a widow, unless with her consent (*Anderson*, 29 May 1873), or unless there is some special reason for her exclusion from the office of executor (*Nicolson*, 17 Feb.1882). The commissary of Perth appointed a factor for the child of the deceased, and decerned him executor in preference to the widow.[3] The appointment may be in favour of two persons and the survivor (*Jobson*, 21 Dec. 1900). In *Johnstone* v. *Lowden* (*supra*) the factor was the mother, and a maternal aunt has been appointed where there was no other relative in this country (*Hanson*, 19 May 1877) [Forms 42, 43]. In modern practice the mother has been appointed factor to her children above pupillarity (*Edington*, 30 Dec. 1912).

As to procedure in the appointment of commissary factors the general practice is to make the appointment without any service or intimation in ordinary circumstances, but of course the application for decerniture as executor is intimated in the usual way. Two great advantages of this somewhat peculiar procedure are: (1) economy, and (2) it affords a very convenient way of avoiding the appointment of a pupil or a minor as executor, which is always awkward even in Scotland, and which may become extremely embarrassing in the case of assets outside of Scotland, especially in the case of stock of the Bank of England or investments domiciled at that bank, for there the signatures of minors are (legally or illegally) rejected even though reinforced by the concurrence of guardians. For these reasons the method favoured in the Edinburgh commissary court as above mentioned, namely, to confirm the factor only,

[1] *Johnston's Exr.* v. *Dobie*, 1907 S.C. 31.

[2] *Fergusson* v. *Dormer*, 1870, 8 M. 426.

[3] Scots Law Magazine, vol. iv. 153 (*Robb*, 1865).

is much the preferable course. It is, however, understood that the difficulties referred to may sometimes be overcome by virtue of s. 66 of the Finance Act, 1916, and the assistance of a certificate from the clerk of court.

Insanity, see p. 61.—The case of *Dodd* there mentioned was in intestacy, and the *curator bonis* to one of the next of kin was decerned and confirmed *qua* such.

Bankruptcy.—An undischarged bankrupt is not thereby disqualified from being appointed one of the executors-dative as one of the, and along with the other, next of kin (*Wilson*, 24 Nov. 1886), see p. 47.

Averments.—Applications for decerniture as executor-dative are now regulated by the Confirmation and Probate Act 1858. The form of petition prescribed by that Act was modified in 1876, and has now been superseded by the modern initial writ; but it is necessary to aver the particulars required by the 1858 Act.

Death.—It is required that the place and date of death be stated. Where the deceased died abroad, or where a considerable interval has elapsed since the death, it is sometimes difficult to ascertain the precise place and date; but they must be set out as exactly as possible. Where the deceased had sailed from Madeira on 22 Nov. 1877, in a ship which had never thereafter been heard of, he was described as having died at sea on or since that date (*Macleod*, 15 March 1878). Where the deceased has been a sailor or passenger in a ship which has been lost at sea it is usual to obtain a certificate of death from the registrar-general of shipping and seamen, custom house, London, and to set out the date of death as on or about the date given in the certificate as that since which the ship has been missing. In all cases the fact of death must be distinctly averred (*Knox*, 23 Dec. 1873). A statement that the person to whose estate confirmation is wanted has disappeared, and is believed to be dead, is not sufficient (*Johnston*, 12 March 1869). In cases of disappearance the application must be preceded by a decree under the Presumption of Life Limitation Act, 1891. Where the fact of death is distinctly averred, no proof is required unless the statement is challenged; but where the petition was by a factor and commissioner whom the alleged deceased had appointed before leaving for Australia, proof was allowed; and on the evidence being reported decerniture was granted (*M'Ewen*, 26 May and 6 June 1882).

Presumed Death.—A decree under the Presumption of Life Limitation Act, 1891, does not find who are entitled to succeed to the person who has disappeared, but merely that he has died on a certain date. The decree therefore gives no authority to any particular person to apply for decerniture as executor. But s. 3 provides that the Act shall not entitle any person to any part of the intestate moveable succession of the person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died. It must, therefore, be averred that the deceased was at the date of his death domiciled in

Scotland, and that being so the right to decerniture falls to be regulated by the ordinary rules applicable to intestacy in Scotland [FORM 54].

Where a husband and wife and their only child perished in the same shipwreck, and no information could be obtained as to the order of death, the brother and sister of the husband applied for decerniture to him in the alternative character of next of kin, or representative of the next of kin—the former if the father, the latter if the child, survived—and the application was granted as craved (*M'Leod*, 9 March 1883).

By the Confirmation of Executors (War Service) (Scotland) Act, 1917, an averment of place and date of death was dispensed with in the case of men officially reported missing and presumed dead.

The Presumption of Life Limitation Act does not apply to life policies. In practice, therefore, any life policies are excluded from the inventory and confirmation, unless it has been (as sometimes it is) ascertained that the office is prepared to pay as on a death, in which case they are included.

Domicile.—The domicile of the deceased must be averred to determine the jurisdiction, in terms of s. 3 of the 1858 Act under which petitions must be presented to the commissary of the county in which the deceased died domiciled; and in the case of persons dying domiciled furth of Scotland, or without any fixed or known domicile, to the commissary of Edinburgh.

The phrase in the 1858 Act, "without any fixed or known domicile," is understood to mean that the domicile has not been ascertained. Where the uncertainty is in what particular county in Scotland the deceased was domiciled, it is usual to aver that the deceased died "without any fixed or known domicile except that the same was in Scotland"; and this averment not only brings the case within the jurisdiction of the sheriff court of Edinburgh, but it shows that the title of the applicant must be determined by the law of Scotland, and that no statement as to the law of the domicile is required. Where the uncertainty is as to the country of the deceased's domicile it generally arises in an alternative form; that is, whether the deceased was domiciled in Scotland or in some other country where he was for the time residing; and in these cases the law may be stated alternatively. Where the domicile cannot be precisely stated, should it appear that any person other than the applicant might possibly fall to be preferred, the consent of that person should be produced. In all cases of uncertain domicile the cause of uncertainty should be succinctly explained in the initial writ, and in the designation of the deceased the residences giving rise to the uncertainty should be briefly stated [FORM 53]. In these cases only Scottish estate can be confirmed.

Intestacy.—It has never been the practice in ordinary cases to require an averment that the deceased died intestate. This is in accordance with the practice in the service of heirs, and indeed in both cases it may be the fact that he did not (p. 67). But it is different where the deceased's intestacy is an express statutory link in the applicant's title to an interest in the estate at all. Those cases are representatives of predeceasing next of kin; the father and mother claiming alongside brothers and sisters;

and brothers and sisters uterine and their descendants; claiming respectively under ss. 1, 3, 4, and 5 of the Intestate Moveable Succession Act, 1855. But even as to these cases it is to be remembered that these rights may arise in cases of partial intestacy. Further, there is now in some courts a suggestion of a requirement that in all cases there should be an averment that the applicant knows of no testamentary writing, or as the case may be. Certainly, whether contained in the initial writ or not, an averment on that subject requires to be made in the oath, and it seems just as well to make the averment in the initial writ.

Unmarried.—Since the Intestate Husband's Estate Act, 1919, has conferred on the widow an exclusive right to the office of executrix-dative in the cases to which it applies, if the net estate does not exceed £500, the better practice, when the deceased was a man and the pursuer is neither the widow nor a descendant of the deceased, is to aver, if it be the fact, that the deceased died unmarried or was not survived by a widow.

Relationship: Title.—The pursuer must aver what relationship, character, or title he has, giving him right to apply for appointment as executor. Under regulations issued by the commissaries of Edinburgh in 1817, it was a rule in regard to edicts that, "if at the instance of the next of kin, they shall distinctly mention the degree of propinquity of the mover to the deceased, and by whom related." This requirement has been continued in regard to initial writs, and has occasionally revealed the fact that the applicant was related through the mother, and had, therefore, no title. It is also required in practice that the initial writ shall definitely state the relationship to the deceased in such a manner as to clear off those who would exclude the pursuer. Thus, where the writ is by the mother, it must state that the deceased died intestate, and without issue, and that his father predeceased him, as it is only in these circumstances that she has any right to the office of executor. And where the pursuer claims the office as next of kin, his averments should be so framed as to show that in a question of succession he holds that character. The effect of this requirement sometimes is to make it appear that the pursuer is not really next of kin, and sometimes not even entitled to share in the succession.

Under the regulations above referred to it was ordered that "if the edict be at the instance of a creditor, the ground of debt shall be specially narrated in it; if at the instance of a disponee or legatee the deed under which he claims to be confirmed shall also be specially mentioned in the edict"; and the documents founded on were ordered to be produced at the calling "that they may be examined before the mover is decerned." This rule also is applied to initial writs.

Law of Foreign Domicile.—Where the deceased has died domiciled furth of Scotland, the character or title in which the pursuer claims the office of executor must be averred, as instructed by the law of his domicile; and a distinct averment must be made that, according to that law, the pursuer is entitled to decerniture in the character set forth, and the foreign law requires to be proved as a fact here. The following are instances [Forms 46–52].

1. The deceased died domiciled in Paraguay. An English administrator *pendente lite* was appointed in England. He applied to be decerned executor-dative. Refused because (1) he had not been appointed by the court of the domicile, and (2) his appointment was for a temporary and limited purpose.[1]

2. The deceased died domiciled in New Zealand with little or no estate there, but with personal estate in this country. The public trustee of New Zealand applied to be decerned executor-dative, producing as his title letters of administration from the court there. His application was opposed, and the office of executor was competed for by the next of kin, resident in Scotland. On inquiry as to the law of New Zealand regulating the appointment of the public trustee as administrator, it appeared that he was not entitled to intervene except in the absence of relatives. Next of kin preferred (*Cormack*, 30 Nov. 1885).

3. The deceased died domiciled in the State of Victoria. The curator of estates of deceased persons in that State obtained an order from the courts there to administer *cum testamento annexo*. The chief part of the estate was in Victoria; only a small part in Scotland; all the beneficiaries abroad. The curator was decerned (*M'Gaw*, 6 July 1888).

4. A "curator on the vacant succession" of a deceased Frenchman appointed by the French courts was decerned in that character (*Génévrier*, 2 Nov. 1883).

5. The deceased died domiciled at Leghorn. A decree was produced from the court there to the effect that the widow was entitled to administer, but appointing a trustee to assist her. The widow was decerned on petition by her and the trustee (*Nimmo*, 5 May 1876).

6. Where the deceased was domiciled in France, the widow was decerned on an opinion that she and the son were the only beneficiaries and administrators, and a power of attorney by both authorising the decerniture of either (*Coolin*, 9 Jan. 1880).

7. Where the deceased died domiciled in Hesse, the widow was decerned *qua* relict and attorney for the children and sole heirs of the deceased, conform to power of attorney by them in her favour, and decree by the grand ducal court at Worms (*Valckenburg*, 27 May 1887).

8. Where the deceased had died domiciled in Uruguay, leaving a widow and minor children, the widow was decerned on her own application on evidence that, by the law of Uruguay, she was entitled to one-third of the estate, and retained the sole control of her children and their property during their minority (*Bowhill*, 16 Nov. 1888).

9. Where there is no widow, the guardian appointed by the court of the domicile for the minor children of the deceased has been decerned (*Kortmeyer*, 12 April 1888).

Publication, etc.—Provision was made for the intimation of petitions by the Act of 1858 (s. 4), directing that every petition for appointment as executor should be intimated by the commissary clerk affixing in some

[1] *Whiffin* v. *Lees*, 1872, 10 M. 797.

conspicuous place of the court and of his office a copy of the petition, and by the keeper of the record of edictal citations at Edinburgh inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of death, and the character in which the petitioner sought to be decerned executor; which particulars the keeper of the record of edictal citations should cause to be printed and published weekly, with the abstracts of petitions for service. And by Act of Sederunt (19 March 1859) provision was made for the transmission to the keeper of a note of the particulars he was required to publish, and for the transmission by him to commissary clerks of a certified copy thereof as published.

By s. 5 of the 1858 Act it was enacted that the commissary clerk, after receiving the certified copy of the printed and published particulars, should forthwith certify on the petition that the same had been intimated and published in terms of the Act, and that this certificate should be sufficient evidence of the facts: it being also provided that where a second petition for confirmation was presented in reference to the same estate, the commissary should direct intimation to be made to the party who presented the first petition. And by s. 4 of the Act of Sederunt, it was directed that the certificate of intimation to be granted by the commissary clerk should be dated, and its date should regulate the time when the petition might be called in court. It would appear, however, that s. 5 of the Act, though only the schedule to which it refers is expressly repealed, is superseded by s. 44 of the Sheriff Courts Act, 1876, which enacts that the sheriff clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by s. 4 of the 1858 Act, and after receiving the certified copy of the printed and published particulars therein set forth—

> forthwith certify these facts on the petition in the following or similar terms: "Intimated and published in terms of the Statute," which certificate (in lieu of the certificate in the form of Schedule C annexed to the said Act, which Schedule C is hereby repealed), shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always that special intimation shall be made to all executors already decerned or confirmed to a deceased person, of any subsequent petition for the appointment of an executor which may be presented with reference to the personal estate of the same deceased person.

The effect is to substitute a shorter form of certificate. It seems also to have been intended to amend the 1858 Act in regard to the intimation of second petitions by providing that intimation should be made only when confirmation or decree-dative had been obtained, and that it should be made to all executors, whether they had applied by petition or not.

By s. 6 of the 1858 Act it was provided that on the expiration of nine days after the commissary clerk had certified the intimation and publication the petition might be called in court, and an executor be decerned; and that the decree-dative might be extracted on the expiration of three lawful days after it had been pronounced. The person who presents the

initial writ can alone be decerned under it. Any one who wishes to be conjoined in, or compete for, the appointment should, before the calling, lodge a notice of appearance, and at the same time present a writ for the appointment of himself. The effect of a decree-dative under a writ is the same as it was under an edict. The person decerned is entitled to sue debtors to the estate, but he cannot uplift or grant discharges until he has given up inventory, found caution, and expede confirmation.

Though decree-dative may be extracted, or confirmation issued, on the expiration of three lawful days after it has been pronounced, yet where there has been competition, no extract or confirmation is, without the order of the sheriff, issued until the period has elapsed within which it would be competent to appeal.[1] Where a decree-dative had been granted on the 14th, and confirmation was issued on the 16th of the same month, the confirmation was reduced on the ground that the decree-dative was not final.[2]

A decree-dative may be recalled, and a new executor conjoined or substituted, at any time before confirmation is issued, even though the decree has been extracted,[3] but where the decree has been extracted reservation may be made of its effect as regards any competent proceedings which have been taken under it (*Cochrane*, 15 Jan. 1853; *Forbes*, 11 June 1889). In a case which occurred in the commissariot of Haddington (*Nisbet*, Dec. 1882), the sheriff, on appeal, held that where a confirmation had been prepared and signed by the clerk, but was lying in his hands undelivered, it was still competent to apply for recall of the decree-dative and to be conjoined in the appointment. But an application to recall a decerniture and the confirmation which had been issued thereon in favour of one of the next of kin, with a view to another next of kin being conjoined in a new decerniture and confirmation, was refused as incompetent (*Campbell*, 13 Oct. 1879).[4] Recall may also be used to correct errors; thus when the date of death had been wrongly stated in the initial writ, a decree which had been pronounced was recalled in order to clear the way for a new initial writ (*M'Bride*, 23–30 May 1913).

Survivorship.—Formerly there was doubt whether the office of executor-dative enured to the survivors where there are more than one.[5] It is provided by the Executors (Scotland) Act, 1900, s. 4, that in all cases where confirmation is, or has been, granted in favour of more executors-dative than one, the powers conferred by it shall accrue to the survivors or survivor, and while more than two survive a majority shall be a quorum, and each shall be liable only for his own acts and intromissions. The provision applies only to executors-dative who have been confirmed. All the executors decerned must concur in giving up inventory and expeding

[1] See 39 & 40 Vict. c. 70, s. 32.

[2] *Collings* v. *Bell*, 6 Dec. 1889, not reported.

[3] *Webster* v. *Shiress*, 1878, 6 R. 102; *Macpherson* v. *Macpherson*, 1855, 17 D. 358.

[4] See also Sheriff-Court Reports, vol. ii. p. 83.

[5] *Anderson* v. *Kerr*, 1866, 5 M. 32; M'Laren on Wills, 3rd ed., 1665.

confirmation. Where one of a number of executors-dative dies or desires to withdraw before confirmation, the survivors are required to obtain either a recall of the decerniture and a new decerniture in their own favour (*Stewart*, 24 June 1875), or the special authority of the sheriff to confirm them as survivors, which is held equivalent to a judicial restriction of the decree-dative in their favour (*Lamond*, 16 Dec. 1859; *Paul*, 23 Oct. 1882). A decree-dative may be recalled in terms of a minute on the petition (Form 64).

Foreigners.—Persons may be decerned and confirmed as executors-dative though resident abroad. A power of attorney in favour of some person in this country may be granted by the persons abroad to present the petition and to make oath to the inventory. But the petition must be in the name of the constituent, who alone is decerned and confirmed, and who also, if within the United Kingdom, is required personally to make oath to the inventory (Form 71).

Corporations and companies may be executors-dative as well as executors-nominate. The Edinburgh Royal Infirmary was decerned *qua* universal legatee (*Grierson*, 14 Jan. 1890), (pp. 56, 97), but this would now fall under s. 3 of the Executors Act, 1900, as a case of executors-nominate without decerniture or caution.

Funerator.—Confirmation as executor-dative *qua* funerator is held to be competent only in small estates where the next of kin are unknown or unable to act, or, after due intimation, do not claim the office of executor. If there are no known next of kin special intimation requires to be made to the King's and Lord Treasurer's Remembrancer. The only ground of debt required is the undertaker's account, where the undertaker is the applicant, or the discharged account if the application is made by the person who has paid it. The applicant must aver all he has been able to ascertain about the relatives of the deceased, and whether they decline to act. Intimation is made in the Gazette and also in such other papers as the sheriff may consider necessary. Where a funerator had been decerned but not confirmed a next of kin who appeared was preferred, and the funerator's appointment was recalled, without expenses, on the ground that he had not communicated the death to the next of kin (*Pyper*, 4 March 1869). Where it was stated that the deceased was illegitimate and unmarried, and evidence was produced that the Crown did not object to the application, the funerator was decerned without advertisement for next of kin (*Maclery*, 15 Nov. 1878). But where a funerator had been decerned, and it appeared on his giving up the inventory that the estate amounted to over £500, intimation was made to the Remembrancer, who objected to confirmation, and entered on possession of the estate (*Tweedie*, 28 July 1864) [Form 34].

Exhaustion of Office.—The case of *Johnston's Exr.* v. *Dobie* [1] is suggestive on this subject, and the following matters may be noted:—

[1] 1907 S.C. 31.

1. *Duration.*—There seems to be no direct authority on the question, but all we know of the nature of the office of executor [-dative] points to this, that it is an appointment which, on whatever ground or in whatever character it may be given, will subsist until the administration of the entire estate has been completed—*per* Lord M'Laren.

Thus an appointment as executor to A., *qua* factor to B., a pupil or minor, does not expire on B.'s majority or death ; nor an appointment *qua* relict, on remarriage.

2. *Resignation.*—It appears that an executor-dative is not entitled to resign office—*per* Lord Pearson.

3. *Discharge.*—It has never been in use for an executor to obtain a discharge, because it is held he cannot get a discharge until he has administered the whole estate ; and conversely that, after he has administered the whole estate, he needs no discharge, because his office has come to an end—*per* Lord M'Laren.

Discharges as executors are as a rule obsolete in practice, though still competent in the commissary courts—*per* Lord Ardwall.

Lord M'Laren's dilemma will not commend itself to the prudent solicitor if it means anything more than that, when an executor-dative has obtained receipts and settlement in full from and with all the parties undoubtedly entitled, he has no need, and no right, to superadd a judicial discharge. He is certainly not bound to denude, even when all is clear, without a quittance. In different circumstances judicial exoneration can be obtained in an action of multiplepoinding.

4. *Bond of Caution.*—According to settled practice the bond of caution is never delivered up. Thus in the case of a judicial factor who thinks it necessary, perhaps in order to facilitate dealing with English assets, to take out confirmation, it results that, while the bond of caution relative to his main title (as judicial factor) is got back, the bond relative to his ancillary title (as executor) is not. Which is an additional reason for judicial factors avoiding confirmation.

CHAPTER VI

INTESTATE HUSBAND'S ESTATE ACTS

Under these Acts of 1911 and 1919, in the cases to which they apply, the widow obtains a new right in addition to all her previously existing rights. The new right is the whole heritable and moveable estate if the net value does not exceed £500; and if it does, then a charge for that amount with interest at 4 per cent. from the death till paid. The conditions of the Acts' application are: (1) Scottish domicile; (2) no lawful issue; and (3) total [1] intestacy.

Domicile.—The 1919 Act contains special provisions on this subject. The Acts apply at all only if the deceased was domiciled in Scotland. The widow's initial writ is to be presented to the sheriff of the county in which her husband was domiciled, or, if the county of domicile is uncertain, to the sheriff of the Lothians and Peebles at Edinburgh. The sheriff who is applied to decides "for the purpose of jurisdiction" any question of domicile, and his decision is final. As under the 1858 Act, this is a carefully limited enactment, and it does not withdraw from the court of session the question whether there is a Scottish domicile so that the Acts may apply. The provision as to doubt between different counties, say Aberdeen and Perth, and the consequent conferring of jurisdiction on the metropolitan sheriff, is new.

No Issue.—This condition is not fulfilled if the deceased is survived by no child but by remoter issue.[2]

Intestacy.—The Acts simply say "die intestate," but, following English precedent, this has been held to mean total [1] intestacy. In the case cited Lord Justice-Clerk Scott Dickson said that it meant "died without leaving a will," but that must mean a will which in fact has taken effect to some extent. Apparently the most trifling legacy, even verbal, would exclude the Acts. There is no guidance by decision as to whether the Acts would be excluded by the existence of revocable and testamentary purposes in a contract of marriage, or by special titles or destinations of testamentary import.

The Limit of £500 is ascertained in a totally different manner from the like question under the Small Estates Acts (p. 171). The latter is mainly

[1] *Taylor's Exrs.* v. *Taylor*, 1918 S.C. 207.

[2] *Grant* v. *Munro*, 1916, 1 S.L.T. 338.

a gross figure; here it is net. In the small estates cases regard is had only to estate in respect of which estate duty is payable, though as an "estate by itself" it escapes aggregation, but here, *e.g.* immoveable estate out of the United Kingdom would need to be counted in. Note particularly that the deductions go beyond debts and funeral expenses, and include death duty and the testamentary (*sic*) expenses of the intestate.

The matter of valuation is left to the sheriff subject, it is assumed, to appeal to the court of session. The valuation applies to the whole estate, heritable and moveable, and wherever situated, and likewise to all debts and liabilities, the issue being—what is "the total net value of the estate?" The only direction contained in the Acts is that the net value of the moveable estate is to be ascertained by deducting "all debts, funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said moveable estate shall be subject." It is not said that the rules of the Finance Acts are to apply, nor even that the valuation is to be made as at the date of death, but in England, under the corresponding Act, that date has been taken.[1] The question is one of great importance, for, if the finding is that the total net estate does not exceed £500, the widow takes the whole estate absolutely for better or for worse. Whereas if the net valuation is, say, £501, she gets under these Acts only a first charge of £500, and all excess remains general intestate succession. In the English case the point was as to a reversionary interest, which, at the husband's death, was of little or no value, but which, when it fell in ten years later, yielded £3500, and it was held that it all went to the widow, because as at the death the total net value did not exceed £500. We should say that that was not doubtful, but suppose that a radical change of circumstances occurs between the date of death and the date of the presentation of the initial writ, or of the sheriff's order. The language of the 1919 Act suggests difficulty, but the 1911 Act is the principal Act, and in s. 1 of the latter Act the word is "leaving," and the language of valuation is clearly referable to the date of death. In this view there might be a house burdened with an annuity of £50 to a middle-aged person, and a policy on the life of another middle-aged third party, and the annuitant and the life assured might both die within a week after the death of the intestate, with the result that, while the net total value at the death did not exceed £500, it had risen to £5000 before the initial writ was presented. On the strength of the foundation enactment in s. 1 of the 1911 Act, backed by the English authority, it appears that the widow takes the whole, because the criterion of valuation is the day of the intestate's death. There may be cases in which it is not known for some years after the death that the Acts apply, but that should make no difference.

Relation to Other Rights.—The following enactments are relevant:—

1911 Act, s. 4 (the Acts are to be read together). The provision for the widow intended to be made by this Act shall be in addition and without

[1] *In re Heath*, [1907] 2 Ch. 270.

prejudice to her rights of terce and *jus relictæ* in the heritable and moveable estate of such intestate remaining after payment of the sum of £500 in the same way as if the residue after payment of the said £500 had been the whole of such intestate's estate, heritable and moveable, and this Act had not passed.

Intestate Moveable Succession (Scotland) Act, 1919. For the purposes of this Act and of the Intestate Moveable Succession (Scotland) Act, 1855, any sum due out of the moveable estate of an intestate to his or her surviving wife or husband, whether at common law, or in virtue of any Act of Parliament, shall be deemed not to be part of the free moveable estate on which the intestate might have tested.

Remembering that the Intestate Husband's Acts apply only to cases where there is total intestacy and no issue, it is understood that, where the estate exceeds £500, the results are:—

1. In addition to the £500, and interest thereon till paid, the widow is entitled to terce and *jus relictæ*.

2. As to terce, so far as the £500 is paid out of heritage subject to terce, the right of terce affects, and is measured by, the balance only of the heritage. The quota of the £500 falling on heritage will again be rateably apportioned, *inter heredes*, upon heritage subject, and not subject, to terce. This applies to heritable bonds due to the deceased, though these are treated in the Acts as moveable estate.

3. As to *jus relictæ*, so far as the £500 is paid out of the moveable estate subject to *jus relictæ*, the right of *jus relictæ* applies, and is measured by, the balance only of the moveable estate so subject. The quota of the £500 falling on moveables, will again be rateably apportioned, *inter heredes*, upon moveables subject, and not subject, to *jus relictæ*.

4. In ascertaining, *e.g.* the one-half of moveable estate payable to the father of the intestate in preference to the brothers and sisters of the intestate, the proportion of the £500 falling on the moveable estate is first deducted (as also of course *jus relictæ*), and the one-half is of the balance only. This rests on the above-quoted provision in the 1919 Intestate Succession Act, the peculiarity of which is that it assumes that the husband could not have tested on the £500, which is contrary to the fact, for that right arises only because he has not tested. But otherwise the brothers and sisters might take nothing. Thus, net estate all moveable and subject to *jus relictæ*, £1500. In the absence of this enactment the division would have been:—

Widow, her preferable	£500
jus relictæ one-half of balance of estate, £1000. (This under s. 4 of 1911 Act)	500
	£1000
Father, one-half of estate after deducting *jus relictæ*, but before deducting the preferable £500 (£1000) .	500
Whole estate . .	£1500

exhausted, without the next of kin getting anything, which is absurd.

The actual distribution is :—

Widow, her preferable	£500
jus relictæ, one-half of balance of estate . .	500
	£1000
Father	250
Next of kin	250
	£1500

Executorship.—When the net value does not exceed £500, the widow has an absolute right to confirmation of the whole moveable estate as executrix-dative *qua* relict, and without the presentation of any commissary writ, but on the usual conditions of (1) a complete inventory with oath and inland revenue statements ; and (2) caution. But while this is so, it is to be noted that, at least as regards heritable securities, the widow does not need confirmation as a title, for an extract of the sheriff's decree, specifying the securities and the properties, recorded in the register of sasines, places her in the position of being " duly infeft in her own right in the heritable . . . securities," even though her husband was not infeft. If it is a small estate, the confirmation may proceed under the Small Estates Acts.

If the net estate exceeds £500 the widow has no exclusive right, and in a competition she may have no right at all, to the office of executrix, and the 1919 Act, s. 3 (2), seems to assume that some one else will be the " executor-dative of the intestate." By way of succession her interest in a large estate may be small ; for example, she may be liberally provided for under contractual provisions in a marriage contract, which excludes *jus relictæ*, in which case there might be words in the contract wide enough to exclude this £500 claim also. But if the net estate exceeds £500 as measured under the Intestate Husband's Estate Acts, and whether there has been an application in the ordinary sheriff court or not, the procedure for confirmation, or decerniture and confirmation, follows the ordinary lines. If the case falls (as it may) under the Small Estates Acts, there is no commissary initial writ and no decerniture, if there is no competition.

Death Duties.—Estate duty is deducted as a " testamentary expense " in fixing the net value of the estate. If the value exceeds £500, and the widow takes under the Acts only a fixed charge of that amount, it would appear that, so far as rateably chargeable against heritage, if any, she will have to contribute to the duty, but not as to moveables.

Completion of Title.—The extract of the sheriff's decree when recorded in the appropriate registers of sasines completes the widow's title to heritage and heritable securities when the estate does not exceed £500, and to her charge on heritage and heritable securities when the estate does exceed that amount, but it is a very peculiar charge, for her real security is, indeed necessarily, " postponed to all debts and obligations of the

intestate," *i.e.* though personal and unsecured. It is catholic over the whole estate, heritable and moveable. It may well be that, when the net estate exceeds £500, arrangements will be made to obviate any such procedure, just as completion of title to terce is almost unknown. Indeed it is to be noted that, even if the net estate does not exceed £500, procedure under these Acts is not essential. The widow could apply in ordinary course either under the small estates Acts or under the general commissary practice, and in that way she could obtain a title probably at less expense. But objections may be (1) that there is no finding that the net estate does not exceed £500, and in certain circumstances the absence of that might prove serious, as we have seen, and (2) completion of title to heritage and heritable securities.

The following is a copy of the statutory form of initial writ, which being strictly non-commissary is printed here instead of in the appendix, and with notes. The statutory schedule assumes that the pursuer will know assuredly how the estate stands with reference to the £500 limit, but that may be disputed and of great importance; there is no reason why, in such a case, the writ should not be adjusted to alternative prayer and pleas.

FORM OF INITIAL WRIT

Sheriffdom of *at* .

A. B., residing at , widow of C. D. [*design*], pursuer, against E. F. [*design*] and G. H. [*design*] (*or as the case may be*), defenders.

The pursuer craves the court:—

To find and declare that her said husband died on or about , intestate, survived by the pursuer, his widow, but leaving no lawful issue, and that he had at the time of his death his ordinary or principal domicile in the county of ; [*or* that he was domiciled in Scotland, but his place of domicile there is uncertain]; that the net value of the whole heritable and moveable estate of the said C. D., the particulars whereof are set forth in the inventory appended hereto, does not exceed the sum of £500, and that the pursuer is entitled thereto absolutely and exclusively in terms of s. 1 of the Intestate Husband's Estate (Scotland) Act, 1911 [*or, in cases where the estate exceeds* £500 *in value, substitute the words* exceeds the sum of £500, and that the pursuer is entitled to £500, part thereof, absolutely and exclusively, in terms of s. 2 of the Intestate Husband's Estate (Scotland) Act, 1911, with interest thereon, from [*date of death*], at four per centum per annum until payment, and to grant a decree against the defender [*or* against the defenders jointly and severally] for payment to the pursuer of £500, with interest at the before-mentioned rate from the said [*date of death*] until payment] and, in the event of the defender [*or* defenders or any of them] opposing this application to find him [*or* them] liable in expenses.

A. B., pursuer,

(*or*) X. Y. [*designation and business address*], pursuer's agent.

CONDESCENDENCE.

1. The late C. D. [*design*] died on or about the day of , and had at the time of his death his ordinary or principal domicile in the county of [*as the case may be*].

2. The said C. D. died intestate, survived by the pursuer, his widow, but leaving no lawful issue.

3. The net value of his whole estate, the particulars whereof are set forth in the inventory annexed hereto, does not exceed [*or* exceeds] £500.

4. The heir-at-law and the heirs *in mobilibus* of the intestate, so far as known to the pursuer, are [*here give particulars*], who are called as defenders.

Note.—If there be no heritable estate, it is unnecessary to call or state the heir-at-law; if there be no moveable estate, it is unnecessary to call or state the heirs *in mobilibus*.

PLEA IN LAW.

The pursuer as widow of C. D. being entitled to the whole estate of her said husband [*or* to £500, part of the estate of her said husband], is entitled to decree as craved.

In respect whereof,
(*To be signed by pursuer or her agent.*)

INVENTORY OF THE HERITABLE AND MOVEABLE ESTATE REFERRED TO IN THE FOREGOING INITIAL WRIT.

Heritable Estate.

	£	*s.*	*d.*
Dwelling-house, No. Street, Portobello, in the county of Edinburgh[1] [*here describe the subjects at length or by reference in competent form*], valued at . . .			
Less principal sum secured by bond and disposition in security thereon granted by the said C. D., in favour of I. J., dated and recorded in [*give date of bond and date of recording and register*] . . .			
Net value . . .			
[*Add particulars of any other heritable estate*][2] . . .			
Total heritable estate. . .			

Note.—If the intestate was not infeft in any part or parts of the heritable estate, deduce his title from the person last infeft at the end of the description of such part or each of such parts respectively.

Moveable Estate.

	£	*s.*	*d.*
Cash in the house			
Household furniture and other effects			
Stock-in-trade and other effects			
Sum in bank with interest to date of death, viz. [*give particulars*]			
Bond and disposition in security dated and recorded in [*give date of bond and date of recording and register*], granted by K. L. in favour of the said C. D., over house, No. Street, in the county[1] of [*or* burgh of and county of] [*here describe the subjects at length or by reference in competent form*][3] for the sum of			
[*Add particulars of any other moveable estate*] . . .			
Total moveable estate . . .			

[1] Apparently conditions in the title need not be referred to.

[2] This will include bonds excluding executors, but not personal bonds though heritable between husband and wife.

[3] It is not stated that the title is to be deduced if the husband was not infeft, and even if that be not done, the widow would be infeft by recording the extract decree duly stamped, but it may be preferred to deduce the title so long as the law remains as it is.

Debts and Funeral and Executry Expenses and Death Duties.

	£	*s.*	*d.*
Debts[1] due by deceased [*give particulars*]			
Funeral and executry expenses [*give particulars*] . .			
Estate duty[2]			
Total debts, etc. . . .			

Abstract.

	£	*s.*	*d.*
Value of heritable estate			
Value of moveable estate			
Total . . .			
Deduct debts, etc. . .			
Net value of estate . . .			

[*To be signed by pursuer or her agent.*]

[1] It is evidently intended that heritable debts should be deducted in the statement of heritable estate, leaving moveable debts only to be mentioned here.

[2] This, on the contrary, is evidently meant to be the whole duty on heritage and moveables.

CHAPTER VII

CONFIRMATION AS EXECUTOR-CREDITOR

Distinctive Differences.—Confirmation as executor-creditor differs essentially from every other kind of confirmation. In the first place, it is in substance not a mere completion of title, but a diligence by which moveable estate which belonged to a deceased person is attached in security and for payment of debts due by him or by his next of kin. In the second place, it may be, and usually is, partial only, that is to say, limited to particular assets or parts of assets, which is incompetent in any other species of confirmation. And in the third place, when the deceased was domiciled furth of Scotland, there is a departure from the rule applicable to all other kinds of confirmation in such cases, for no deference is paid to the law of the domicile as regards either administrative title or beneficial right, and consequently the creditor is not required to aver that, under the law of the domicile of the deceased, he is entitled to administer (*Tod*, 21 Jan. 1869; *Malcolm*, 11 Oct. 1878—alternative domicile).

The first of these essential differences was very clearly stated by Lord Curriehill: [1]—

> I think there has been a great deal of fallacy in the argument. That fallacy consists in overlooking the true nature and legal character of a confirmation as executor-creditor. The parties are led into that fallacy by the diligence being called a confirmation. It is no doubt of the nature (form ?) of a confirmation, but its true legal character is that it is legal diligence or execution. Confirmation by an executor of any other character is the proper *aditio hæreditatis in mobilibus*, a mode of making up a title to the defunct by a representative. But the confirmation of an executor-creditor is a species of legal execution and diligence for the payment of debt, and the true effect of it is to create a *nexus* on the fund, and that *nexus* is subject to two limitations. One is the amount of the debt itself. If the party attaches a fund which is worth £10,000 while his debt is only £5000, he creates a *nexus* upon that fund to the extent of £5000, and the rest does not belong to him in his own right at all. And then in the second place, there is a limitation put upon it by the valuation that he is bound by law to put on it. I think that both of these things limit the extent of the right he acquires by the diligence, but that right in its nature and legal character is a security for the debt.

How Excluded.—This diligence is excluded by—

1. *Confirmation* by any executor of any class, that is to say, confirma-

[1] *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142, at p. 1169.

tion of the same asset or assets and the same value. There might be a series of confirmations of executors-creditors, each taking up different assets, or different shares of the same asset, or excess value in the same asset, and in the latter case the previous confirmation might have been in favour of any ordinary executor, as it might also be in the case of omitted assets. But a mere decree-dative does not exclude,[1] nor does such a decree in favour of an executor-creditor confer any preference.[1]

2. *Possession* by the deceased's successors, *e.g.* his testamentary trustees, executors-nominate or dative, or beneficial successor. The case of *Smith*[2] is instructive on this point and on the whole subject. A. left a general trust settlement and made his son, B., his residuary legatee. B. subsequently died domiciled in India, also leaving a general trust settlement. B.'s trustees obtained a grant of representation to his estate in India but not in Scotland. They intimated B.'s general will and the Indian grant to A.'s trustees, and they intervened in the management of A.'s estate in Scotland, but it remained vested in A.'s trustees. Finally, A.'s trustees sold his estate. There ensued a competition between creditors of the son, B., for ranking on his asset, which consisted of his right to the residue of A.'s estate. One of B.'s creditors claimed a preference on that asset in virtue of confirmation expede by him as executor-creditor of B. The asset was held to be moveable, otherwise the confirmation would have been inept. It was also held that, notwithstanding the above-mentioned intimations, B.'s right to the residue of A.'s estate had remained *in bonis* of B., and that therefore the confirming creditor had obtained a preference.

3. *Completed Right.*—This is only a special form of the preceding. Instances are a special assignation by the deceased, *e.g.* a specific legacy intimated to the holder of the asset or debtor, or a bond of corroboration granted by the debtor in favour of the deceased's successors.

But though the matters mentioned in the three preceding paragraphs make the diligence incompetent because the asset is no longer *in bonis* of the deceased, all gratuitous successors are of course postponed to creditors.

4. *Sequestration* of the deceased. By s. 106 of the Bankruptcy (Scotland) Act, 1913, if there is a sequestration of the deceased's estate dated (which (s. 41) means the date of the first deliverance) within seven months after his death, " any confirmation as executor-creditor after the debtor's death shall be of no effect in competition with the trustee " ; subject to repayment in full to the creditor of his *bona fide* expenses of the confirmation. And by s. 29 no confirmation as executor-creditor can be granted after the date of the first deliverance on the sequestration petition.

5. *Non-Scottish Grant of Representation* does not exclude, but of course the resealing in Scotland of an English or Irish grant, or of any other grant which is so rescalable, is equivalent to a Scottish confirmation and bars the creditor's diligence in this form.

[1] Bell, Commentaries, 2, 81.

[2] *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142.

Liquid Debt.—The creditor must produce as his title a liquid document of debt, such as a bond or bill by the deceased, or the decree of a competent court against him. A holograph IOU might now be accepted.[1] The creditor under a heritable bond has been decerned executor-creditor in virtue of the personal obligation in the bond, it being averred that the specific heritable security was insufficient to pay the debt (*Trent*, 28 Jan. 1887). But that fact is not essential, the bondholder being entitled to enforce all his remedies independently and concurrently.[2]

It is hardly necessary to say that the domicile of the applicant and the country of origin of the obligation are immaterial. Thus decerniture was granted to a creditor under a bill drawn and accepted in India and endorsed to him in London, there being produced, for the information of the court on the fact of foreign law, the opinion of an English barrister, skilled in Indian law, that as regards requisites of form and stamp the bill was in order according to Indian law (*Tod*, 20 Nov. 1885).

The obligation need not be pecuniary; it may be *ad factum præstandum—e.g.* to transfer personal estate to trustees, or, indeed, to anyone, in which respect the diligence resembles adjudication in implement in the case of heritage. Thus the trustees under a contract of marriage, by which the deceased wife had assigned to them the whole estate then belonging to her, or which she might acquire during the marriage, were decerned and confirmed *qua* creditors to certain company shares which fell under the conveyance, but which had not been transferred to the trustees (*Brash*, 7 Oct. 1887; *Jazdowski*, 19 March 1889). In like manner a trustee for creditors made up title in this manner, after the bankrupt's death, to moveable assets forming part of the trust estate (*Scott*, 13 April 1882).

Illiquid Debt.—If the creditor has not a liquid ground of debt, he must constitute his claim under the Act, 1695, c. 41, by charging—

> the defunct's nearest of kin to confirm executor to him within twenty days after the charge given, which charge so execute shall be a passive title against the person charged as if he were a vitious intrometter, unless he renunce, and then the charger may proceed to have his debt constitut, and the *hæreditas jacens* of moveables declared lyable by a decree *cognitionis causa*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form.[3]

The charge may be dispensed with where the creditor restricts his claim to a decree *cognitionis causa tantum*,[4] but, if charged, the next of kin must either confirm or renounce.[5] Decerniture *qua* creditor was granted under a decree of cognition by the court of session, in which the only defenders called were the universal legatories (*Rodney*, 3 June 1887). Where the widow of the deceased was abroad, arrestments *jurisdictionis fundandæ causa* had been used against her before bringing the action of cognition,

[1] *Theim's Trs.* v. *Collie*, 1899, 1 F. 764.

[2] *M'Whirter* v. *M'Culloch's Trs.*, 1887, 14 R. 918; *M'Nab* v. *Clarke*, 1889, 16 R. 610.

[3] Act anent Executry and Moveables.

[4] *Forrest* v. *Forrest*, 1863, 1 M. 806.

[5] *Davidson* v. *Clark*, 1867, 6 M. 151.

and the decree was in favour, not of the original creditor, who held an open account against the deceased, but in favour of the deceased's daughter, who had acquired right to the debt (*Clarkson*, 1 Feb. 1889).

Equalisation.—By Act of Sederunt, 28 Feb. 1662, all creditors of the deceased doing diligence within six months after his death rank *pari passu* on the moveable estate. Even on the expiry of the six months the executor, though he is not a trustee for creditors, is not entitled to pay to one creditor over another of the same rank if he has notice of insolvency.[1] So long as the fund is undistributed, equality of ranking is obtained by intimation after the six months,[1] except as against an executor-creditor.[2]

When an executor-creditor has confirmed within the six months, equality of ranking with him is obtained by "citing him" [intimation to him ?] within that period, and even if he should have realised the asset to which he confirmed, he has to distribute its proceeds rateably among all the creditors thus entitled to rank with him.[3] As the best means of securing this equality, any other creditor can appear and be conjoined in the confirmation as executor-creditor within the six months, provided he comes in before confirmation.

When there has been confirmation as executor-creditor within the six months, the title thereby obtained, with the *pari passu* rankings secured within that period, is preferable to any creditor coming forward only after the six months. When the six months have expired, any confirmation as executor-creditor thereafter granted is preferential over any creditor coming forward after its date, but the mere application or decerniture gives no preference, and, again, any other creditors can obtain a *pari passu* ranking by coming forward before confirmation and being conjoined.

In all these questions it is necessary to note that, if an executor-nominate, or any ordinary executor-dative, is himself a creditor, the confirmation in his favour is to him as good as confirmation as executor-creditor.[4]

Partial Confirmation.—By the Act of 1823 [5] it was enacted that, in the case of confirmation by an executor-creditor, such confirmation might be limited to the amount of the debt and sum confirmed to which such creditor should make oath, provided that notice of the application be inserted in the Edinburgh Gazette.[6] This Act, in granting to executors-creditors the power to expede a partial confirmation, merely continued in their favour

[1] *Taylor & Ferguson* v. *Glass's Trs.*, 1912 S.C. 165; *Salaman* v. *Sinclair's Tr.*, 1916 S.C. 698.

[2] *Macleod* v. *Wilson*, 1837, 15 S. 1043; Bell, Commentaries, 2, 85.

[3] *Ramsay* v. *Nairn*, 1708, M. 3934, 3139.

[4] *Macleod* v. *Wilson*, 1837, 15 S. 1043; Bell, Commentaries, 2, 80.

[5] 4 Geo. IV. c. 98. s. 4.

[6] By Act of Sederunt of 12 Nov. 1825, s. 19, it was provided that the notice must be inserted "within ten days after the edict has been signed by the clerk." The edict being now abolished, the notice is in practice inserted in the next Gazette published after the initial writ (which comes in place of the edict) is presented. There is no time fixed which must elapse between the Gazette notice and the calling.

a right conferred upon them by Act of Sederunt, 14 November 1679, that they might not be "unnecessarily entangled in the execution of the defunct's debts beyond their own satisfaction," and that there might be "place for an executor *ad omissa* for the rest." An executor-creditor, like other executors-dative, is bound to do diligence in recovering the whole estate confirmed by him, and if he recovers more than sufficient to satisfy his own claim, he is liable to account for it as an ordinary executor would be. In the instructions issued by the commissaries of Edinburgh, dated 1 January 1824, they directed that confirmation by an executor-creditor might comprehend no more of the inventory recorded than a sum equal in amount to the debt due and the expense of confirmation; in other words, it might be a confirmation to any extent the executor desired. The creditor need not depone to the verity of his debt.[1]

Full Inventory.—Every inventory given up must be a full and complete inventory of the estate, though the confirmation may be limited. The limitation may be either to certain items in the inventory (*Macdonald*, 17 Dec. 1888; *Jazdowski*, 19 March 1889), or to a portion of one item sufficient to meet the creditor's claim, as may be specified in the oath to his inventory (*Bradley*, 10 February 1880, and 12 June 1883). Only the items of estate of which confirmation is craved in whole or in part are quoted in the confirmation. A partial confirmation does not carry more than the sum confirmed. A creditor confirming *ad omissa* may call a creditor partially confirmed to account for what he has drawn beyond the sum confirmed [Form 31].[2]

Particular Creditors.—An incorporated company may be decerned *qua* creditor, the oath to the inventory being taken by the secretary (*Whitson*, 15 Jan. 1874); also a firm "along with A. and B., the individual partners thereof" (*Fortune*, 16 Nov. 1855). A. and B., the individual partners of A., B., & Co., were decerned executors-dative *qua* creditors of the deceased C., an individual partner of the firm C., D., & Co., the ground of debt being a bill drawn by A., B., and Co. upon, and accepted by, C., D., and Co. (*Sibbald*, 17 April 1862). One of two trustees in whose favour the deceased had granted a bill was decerned *qua* creditor, the other trustee being abroad (*Hitchcock*, 2 June 1870). A confirmation *ad male appretiata* was issued in favour of an executor-creditor, containing the same item of estate as had been confirmed in the original confirmation in favour of another executor-creditor, but valued at £100 more. The additional value only was confirmed, and the first executor neither objected nor asked to be conjoined in the second confirmation (*Malcolm*, 30 Nov. 1878). Decerniture *qua* creditor being craved under an unstamped deed, its liability to stamp-duty was referred by the sheriff to the inland revenue authorities, and the petition was granted on the deed

[1] *Greig* v. *Christie*, 1837, 15 S. 697.

[2] *Lee* v. *Donald*, 17 May 1816 F.C.; Erskine, 3. 9. 37.

being again produced bearing stamp and penalty paid and "adjudged duly stamped" (*M'Grigor*, 22 Oct. 1880). The liquidators of a bank were decerned executors-dative *qua* creditors on the estate of a deceased shareholder (*Bishop*, 31 Oct. 1861). But under the Companies Act, 1862, it was held that the liquidators of the City of Glasgow Bank were entitled to be decerned and confirmed "*qua* liquidators of the City of Glasgow Bank, of which the deceased was a contributor" (*Mackenzie*, 14 Feb. 1879).

Creditors of Next of Kin.—At common law the personal estate of a deceased person is preferentially available for payment of his own debts before being taken to meet the debts of his next of kin or testate successors. By the common law this preference was unlimited in time so long as the assets could be identified, and that is still the position when there has been confirmation.[1] But in the absence of confirmation the preference is by statute (1695, c. 41) cut down to year and day after the death.

In order to work out the right of the creditors of the next of kin confirmation as executors-creditors is competent, not only to the creditors of the defunct, but also to the creditors of his next of kin. The Act 1695, c. 41, ordains—

> that in the case of a moveable estate left by a defunct, and falling to his nearest of kin who lyes out and doth not confirm, the creditors of the said nearest of kin may either require the procurator-fiscal to confirm and assign to them under the perril and pain of his being lyable for the debt, if he refuse, or they may obtain themselves decerned executors-dative to the defunct as if they were creditors to him, with this provision alwayes that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of their debitor's deceas, shall alwayes be preferred to the diligence of the said nearest of kin.

Confirmation to the estate of a deceased has been granted to the trustee on the sequestrated estate of his next of kin (*Macdonald*, 9 July 1857); and even where the deceased had died domiciled abroad, when a decree had been obtained from the Lord Ordinary, finding that his interest in his ancestor's succession had vested in the trustee (*Davidson*, 19 April 1866) [Form 33].

The death of the next of kin does not prevent his creditor confirming as executor-creditor to the first deceased.[2]

It is not to be supposed that confirmation in favour of a creditor of the next of kin cannot proceed till year and day have expired from the death. If granted, it will exclude confirmation of the same assets by creditors of the deceased, but it will not prejudice their preference if enforced within the year and day.

Other Beneficial Successors.—The Act 1695, c. 41, speaks only of creditors of the next of kin, and there is no authority for extending it to creditors of other intestate representatives or to testate representatives.

[1] Bell, Commentaries, 2, 86.

[2] *Smith's Trs.* v. *Grant*, *supra*.

If those creditors are also assignees of their debtor's interest in the estate they can confirm as derivative successors (p. 69). If not, they can arrest in the hands of the executors if any.

English or Irish Estate.—Though unusual, there is nothing to prevent an executor-creditor giving up and confirming personal estate situated in England or Ireland, and it has been done. The domicile of the deceased being in Scotland, the confirmation can be resealed and will then be a title to uplift. But that is not to say that the quality of legal diligence according to Scots law will then attach to it so far as concerns the non-Scottish assets.

CHAPTER VIII

THE INVENTORY

In order to obtain confirmation, executors, whether nominate or dative, were, according to ancient practice, bound to give up on oath an inventory of the whole moveable estate of the deceased, so far as known. But from an early period the commissaries admitted confirmation on such inventories as were offered; and it was decided that they were bound to confirm executors upon any inventory though notoriously defective. Nor were executors obliged to expede confirmation at all if they could recover the estate without it. The commissaries had at one time the right to compel executors to confirm the testaments of their relatives, but they were forbidden (Act 1690, c. 26) to exercise this right except at the instance of the widow, children, next of kin, or creditors. In cases of intestacy confirmation to some portion of the estate was necessary to vest the succession; but confirmation to a part was sufficient to vest the whole so that, wherever any item could be recovered without confirmation, executors either omitted it from the confirmation, or confirmed only a part of it. This was to keep down the percentage levied on the amount confirmed, and the amount of caution which all executors, nominate as well as dative, were then bound to find. When confirmation could not be dispensed with, however, some inventory had to be given up, and a money value required to be attached to each item.

The Act of 1690 further provided—

> That where speciall assignations and dispositions are lawfully made by the defunct, tho neither intimate nor made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruike, enjoye, pursue, or defend, albeit the soumes of money or goods therein contained be not confirmed, without prejudice alwayes to the competitione of creditors and others, and of their rights and diligences as formerly before the making heirof.

Under this provision it became the practice either to specify the items of estate in the will or to make reference to an inventory, signed as relative to the will, containing the items, which was held a special assignation of each item and to supersede the necessity for confirmation.[1]

By the Revenue Act of 1808,—superseding a prior statute of 1804, under which stamp-duty had been impressed not on the inventory but on the confirmation,—every person who, as executor, next of kin, creditor,

[1] *Lyle* v. *Falconer*, 1842, 5 D. 236.

or otherwise should intromit with any personal estate of any person dying after 10 October 1808, was bound, on or before disposing of or distributing any part of the estate, or uplifting any debt due to the deceased, and, at all events, within six months after having assumed possession, and before confirmation, testamentary or dative, to exhibit upon oath or affirmation in the proper commissary court a full and true inventory, stamped as required by the Act, of all the personal estate of the deceased already recovered or known, distinguishing what was situated in Scotland and what elsewhere, which inventory should be recorded in the court books. No commissary court was to grant confirmation, testamentary or dative, or eik thereto, of any estate of any person dying after 10 October 1808, unless the same was included in an inventory, so recorded; and it was made incompetent to any executor, or other person, to recover any debt or effects in Scotland, of any person dying after 10 October 1808, unless the same were included in an inventory so recorded; unless the same were vested in the deceased as trustee and not beneficially. These provisions were not in other respects to prejudice the law regarding total or partial confirmations or the rules of succession.[1] The effect was that executors were bound to give up a full inventory, duly stamped, and it was unlawful to confirm, and incompetent to recover, any estate not included in the inventory; but executors were not bound to take confirmation, and if they did confirm, they could as formerly limit the amount of the estate confirmed.

In 1823 two Acts were passed by which important changes were effected. By the one[2] all compositions in respect of confirmation and all fees termed consignation fee and sentence money were abolished. By the other,[3] caution for executors-nominate was dispensed with, and in the case of executors-dative the court was authorised to fix the amount of caution, not exceeding the amount confirmed, and all persons requiring confirmation were bound to confirm the whole moveable estate known at the time, to which they should make oath, except executors-creditors, who might limit their confirmation to the amount of their debt, but nothing contained in the Act was to affect the 1690 Act regarding special assignations.

By force, therefore, of the reservation in the Act of 1823 of this provision of the Act of 1690, special assignations, though not confirmed, are a good title to the subjects assigned. But after the abolition of the imposts on confirmation, special assignations in wills gradually ceased, and they are now unknown in practice in the sense of special assignations of particular assets in favour of testamentary trustees or executors. But the law as to special assignations is still important with reference to (1) specific bequests (not through trustees) of corporeal or incorporeal moveable assets; (2) special titles and destinations referred to on p. 114; and (3) the peculiar case of uncharged entail improvement expenditure referred to on p. 107.

[1] 48 Geo. III. c. 149, ss. 38–42.

[2] 4 Geo. IV. c. 97, s. 1.

[3] 4 Geo. IV. c. 98. ss. 2, 3, 4.

While the inventory was by the Act of 1808 to be a full inventory of the personal estate situated in Scotland *or elsewhere*, it was provided by s. 41 that duty should be charged only on the value of the estate in Scotland, and it was only of Scottish personal estate, as being within the jurisdiction of the Scottish courts, that confirmation could be issued.

But by the Confirmation and Probate Act, 1858 (s. 9), it was made competent to include in the inventory of any person who died domiciled in Scotland any personal estate situated in England or Ireland,[1] or both: provided that the person applying for confirmation should satisfy the commissary, and that the commissary should by his interlocutor find, that the deceased died domiciled in Scotland, which interlocutor should be conclusive evidence of domicile. The value of the personal estate in England or Ireland requires to be separately stated in the inventory, and the inventory is impressed with a stamp corresponding to the entire value of the estate in the United Kingdom.

This section was amended by the Sheriff Court Act, 1876, (s. 41):—

> Where it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff, with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland; but in place thereof, that fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be a sufficient warrant for the sheriff clerk to insert in the confirmation, or to note thereon and sign, a statement that the deceased died domiciled in Scotland, and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland.

Where a question of domicile arises affecting jurisdiction, the validity of a will, the title of the executor, or the payment of duty, the oath does not preclude further inquiry, it being provided by the 1858 Act, s. 17, that the interlocutor of the commissary "shall be evidence and have effect for the purposes of this Act only,"[2] and s. 41 of the 1876 Act gives to the new procedure only the same effect.

By the Finance Act, 1894, the obligations incumbent on executors on giving up an inventory have been greatly increased. By that Act inventory duty ceased to be chargeable, except in the case of persons dying before 2 August 1894, and there is substituted the more comprehensive estate duty, leviable, save as therein expressly provided, not only on property which had been subject to inventory and probate duty, but on all property, real and personal, settled and not settled, passing or deemed to pass on the death of any person dying after 1 August 1894.

Personal property situated out of the United Kingdom, though always required to be set out generally in the inventory, was exempt from inventory duty, but, where the deceased died domiciled in the United Kingdom, it is now generally subject to estate duty, though liability

[1] See Chap. XVII.

[2] *Orr Ewing's Trs.* v. *Orr Ewing*, 1885, 13 R. (H.L.) 1—*per* Lord Selborne, at p. 11.

attaches only if (s. 2 (2)) under the prior law legacy or succession duty is payable or would be payable but for the relationship (but see Finance Act, 1923, Part IV.). Such property must now be specified in detail, and the value must be extended in the same manner as if it had been situated in the United Kingdom. Being, however, not within the jurisdiction of the courts of this country, it cannot be included in the estate confirmed. It is set out in the inventory merely that it may be included in the sum on which duty falls to be paid. When the deceased was not domiciled in the United Kingdom, estate abroad must, as formerly, be stated in a note to the inventory, but particulars need not be given. As to deductions from valuation of foreign property, see p. 150.

Special provision is made in regard to property situated in British dominions as distinguished from foreign countries. Where this property is subject to estate duty, and any death duty is payable thereon in the country where it is situated, the amount of the latter duty is allowed as a deduction from the estate duty which may be payable in this country in respect of the same property on the same death (s. 20 (1)). But this provision takes effect only in regard to property in British dominions where reciprocal arrangements have been established, and to which it has been applied by orders in council (s. 20 (3)). A list of British dominions, to which the provision has been so applied, is given below.[1] Where this relief does not apply the property is treated as foreign, so as to allow the dominions duty off the valuation.

Formerly it was incompetent to include in an inventory, for the purpose of paying duty, any English or Irish estate unless the deceased died domiciled in Scotland ; and a similar restriction applied to any application for representation in England or Ireland. But now, in giving up an inventory in Scotland, or in applying for representation in England or Ireland,[2] the whole personal estate, wheresoever situated, must be included, and duty may be paid thereon (6 (2), 8 (3)). There is, however, no corresponding extension to the courts of the three kingdoms of power to include the whole estate in the title granted by them. It remains incompetent, where the deceased has not died domiciled in Scotland, to confirm any estate not situated in Scotland, and a grant of probate or administration in England or Ireland can be made effective as a title to Scottish estate only when the deceased has died domiciled in the country where the grant has been issued. Where the deceased has died domiciled furth of the

[1] Australia (Commonwealth of), Bahamas, Barbados, Bermudas, British Columbia, British Guiana, Ceylon, East Africa Protectorate, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast, Grenada, Hong Kong, India (not including the Feudatory Native States), Jamaica, Labuan, Lagos, Leeward Islands, Malay States, Manitoba, Mauritius, New Brunswick, Newfoundland, New South Wales, New Zealand, Nova Scotia, Nyasaland Protectorate, Ontario, Papua, Quebec, St Lucia, Sierra Leone, Southern Rhodesia, South Australia, Straits Settlements, Swaziland, Tasmania, Trinidad, and Tobago, Uganda, Victoria, Wei-hai-wei, Western Australia, Yukon Territory (Dominion of Canada), and Zanzibar Protectorate.

[2] See Chap. XVII.

United Kingdom, with estate in more than one of the three countries to which a title is required, it is still necessary that the title be made up in the country where the property is situated. Where duty on the whole estate has been paid in England or Ireland, and confirmation of the estate in Scotland is required, the inventory given up in Scotland is accepted if impressed with a "duty-paid" stamp in the country in which payment was made or on other evidence that the duty has been paid.

Where the value of any property falling to be included in an inventory has not been ascertained when the inventory is given up, the property may be set out without having any value attached to it, with a note by the executor that when the value is ascertained he will give up an additional inventory and pay any further duty that may be due (s. 6 (3)). This is in accordance with previous practice. Such an entry of property in an inventory does not entitle the executor who has confirmed it to uplift and discharge it until its true value has been given up and an eik to the confirmation has been obtained. But in this connection attention should be paid to the statutory standard of valuation as dealt with in Chap. IX and to the fact that a *nil* (p. 148) or even a *minus* (p. 150) valuation as at the date of death may be competent and final.

By the Act of 1894 (s. 15 (2)), the Treasury have power to remit the estate and other death duties leviable on objects of national, scientific, or historic interest. This has been extended by the Acts of 1896 (s. 20) and 1909–10 (s. 63). Objects of artistic interest are included. The sections apply even though there is no "settlement." There is no duty payable till sold, and then only on the price and only in respect of the last death on which the property passed. Aggregation is excluded. A separate schedule giving the particulars and value of the excepted property is required by the inland revenue.

Under powers conferred by the 1894 Act (s. 8 (14)), the commissioners of inland revenue have issued printed forms, the use of which is obligatory. The inventory of personal estate and relative oath are kept distinct, but there are appended a statement of all the property in respect whereof estate duty is payable, accounts which the executor is required to fill up, and a separate deposition which he is required to make. Only the inventory and oath are recorded in the sheriff court, the statement, with its deposition prefixed, being transmitted therewith to the inland revenue office.

Although most kinds of property are subjected to estate duty, and accounts thereof must be appended to the inventory, the estate to be included in the inventory itself consists of the personal estate belonging or due beneficially to the deceased at his death. That alone is the estate which the executor, as such, is entitled and bound to administer. Under s. 6 (1) of the 1894 Act the executor must pay (with relief where appropriate) the estate duty on all personal estate whersoever situate, of which the deceased was competent to dispose. That clearly may include more than passes to the executor as such or at all, *e.g.* it includes *mortis causa* donations and property dealt with by special assignations in favour of

other persons. But that is one thing, and the contents of the inventory with a view to confirmation are another thing. As we have seen, these special assignations are saved by statute, and are in themselves complete titles; and it is not necessary, and might be very undesirable, to bring them into the inventory and confirmation, if indeed to do so is competent in a question with the special assignees.

1894 Legislation.—The changes made by the 1894 Act were fundamental. The principle and basis of estate duty are essentially different from those on which the old inventory duty rested. It depended on jurisdiction and personal quality; except, in the latter case, after 1860, as to bonds excluding executors and money secured by *ex facie* absolute dispositions. Estate duty rests on domicile, *i.e.* of the deceased, with an exception of immoveables out of the United Kingdom, even where the deceased was domiciled therein, plus a compensating inclusion for duty-liability of all estate, moveable or immoveable, in the United Kingdom, even when the deceased was not domiciled therein. The word immoveable is used because leaseholds abroad are exempt, though under English law they are personal property. It will be noted that the domicile of the beneficial successor is irrelevant.

One effect of these changes is that it is now not nearly so important as it formerly was to inquire whether a particular asset is heritable or moveable, whether it can or must be included in, or excluded from, the inventory of personal estate. Formerly (with the exceptions above mentioned) that was the criterion of liability to, or immunity from, inventory duty. But now, though home assets are heritable or real, estate duty is payable all the same; and whether the domicile of the deceased was, or was not, in the United Kingdom. As to assets out of the United Kingdom, the position is different. Certainly, even if personal, they cannot be confirmed, but in that case they pay estate duty, when the domicile was in the United Kingdom, whereas if heritable or real (or immoveable), they escape. The *lex loci* decides whether assets are real or personal.

Under reference to Scottish and English treatises on succession (and this book is not of that nature) the quotations and alphabetical lists of instances or illustrations which follow may be found useful. It must be steadily kept in view that for the present purpose the question is one between heir and executor, not between seller and purchaser, landlord and tenant, superior and vassal, or bond-holder and general creditor. This applies to both assets and liabilities, the test being, neither physical adhesion nor conveyancing completeness, but something essentially different, viz.—

The Deceased's Intention.—The following quotation is from Lord Shand:[1]—

> The principle on which the cases of heir and executor proceed is intention or destination. Was it the purpose of the person who put them up to destine

[1] *Marshall* v. *Tannoch Chemical Co.*, 1886, 13 R. 1042.

them to his heir? Did he so far as possible attach them to the ground, having that end or effect in view? The presumption is that it was never meant that the executor should be allowed to dismantle the ground completely by taking away what was there for a special purpose in connection with the use to which the ground was put.

Extreme instances are (asset) loose materials collected on the ground for building, which go to the heir;[1] and (liability) an invalid heritable security, and the excess of debt over the value of the property included in a valid heritable security, both of which fall upon the heir.[2]

Principal and Accessory.—The following is from Moncreiff (Lord Justice-Clerk)[3]:—

> The principle of law on which such questions depend is the general maxim that an accessory follows the principal. But what constitutes accession, or in what cases it is to be presumed, are sometimes questions of great difficulty. In the older authorities there is a strong leaning to the heir, but the emergencies of trade and altered social relations have modified this much.

Two other guiding rules should be noted:—

1. Leases in Scotland go to the heir, and what shall go with them as accessories is dealt with just as though the deceased had been owner instead of merely tenant.[4] In England and Ireland, and any other country where leases are personal estate, the principle will probably be the same, and the result therefore the opposite.

2. A tenant's right of removal is a right against his landlord, and is irrelevant between the tenant's heir and executor.[5]

Heritable Assets

Annuities.[6]—But consider the effect of the Titles to Land Consolidation Act, 1868, s. 3, where bonds of annuity are specified as among the heritable securities made personal in the creditor's succession.

Building materials[7] collected on the ground to complete; or even the amount of money required to complete according to plan;[8] the latter was a legitim case.

Cisterns "affixed" (? kept in position) by their own weight. These were in large industrial works.[9]

Dung because dedicated in intention to the soil, though not yet applied.[7]

[1] *Dowall* v. *Miln*, 1874, 1 R. 1180 (Lord Neaves); *Reid's Exrs.* v. *Reid*, 1890, 17 R. 519 (Lord President Inglis).

[2] *Bell's Tr.* v. *Bell*, 1884, 12 R. 85.

[3] *Dowall* v. *Miln*, 1874, 1 R. 1180.

[4] *Brand's Trs.* v. *Brand's Trs.*, 1876, 3 R. (H.L.) 16; *Reid's Exrs.* v. *Reid*, 1890, 17 R. 519; *Muirhead's Trs.* v. *Muirhead*, 1905, 7 F. 496.

[5] *Brand* and *Reid*, *supra*.

[6] *Reid* v. *M'Walter*, 1878, 5 R. 630.

[7] *Reid's Exrs.* v. *Reid*, 1890, 17 R. 519—*per* Lord President Inglis; *Dowall* v. *Miln*, 1874, 1 R. 1180—*per* Lord Neaves.

[8] *Malloch* v. *M'Lean*, 1867, 5 M. 335.

[9] *Bell's Tr.* v. *Bell*, 1884, 12 R. 85.

Entail expenditure on (1) improvements,[1] and (2) estate duty.[2] These create rights *in bonis* of the disburser, though not charged in his lifetime. The right is personal between heir and executor, but heritable as regards husband and wife and legitim. The improvement claim cannot be charged at all after his death unless he has expressly assigned or bequeathed it. That appears not to affect the present question (but see remarks by Lord Dunedin in *Moray*),[2] but it is of great interest as the express assignation or bequest is such a " special assignation " as dispenses with confirmation (p. 100), and the only known instance where a title of that kind is not only permissive but compulsory.

Goodwill.—It is a question of circumstances. The goodwill may be wholly heritable; or it may be partly heritable and partly moveable; possibly it may be wholly moveable; also it may have no value. It may be wholly heritable although the deceased was tenant only, with less than a year to run at his death, and only six weeks at the date of the sale.[3] In the case of a public-house in a large town the goodwill is generally wholly heritable.[4]

Machinery [5] is heritable (1) when attached to the heritage, so that removal means injury to one or other; or, (2) though less completely attached, if (*a*) it is essential or material to the use of the heritage; or (*b*) has special value where it is from special adaptation; or (*c*) expressed intention.

Tile Hearths.[6]—This was between seller and purchaser; therefore heir and executor is *a fortiori.*

Threshing Mill fixed in farm buildings; tenant's property.[7]

Vegetables.[6]

Moveable Assets

Copyright.

Goodwill.—See above. Also in partnership cases, if legally existing at all; also apparently in English and Irish leaseholds. The building of a pottery and plant and machinery, fixed and unfixed, were sold under articles of roup, and the purchaser was taken bound to purchase the stock in trade and work in progress at an additional fixed sum. Admittedly both heir and executor benefited from this mode of realisation. The executor's additional claim to a part of the price of the heritage as goodwill was refused.[8]

Income Tax refund, though in respect of Sch. A tax.

Patents.

Pictures on Canvas [9] inserted in wall of house. This was between

[1] *Earl Kintore* v. *Countess Dowager,* 1885, 12 R. 1213.

[2] *Lord Advocate* v. *Lord Moray's Trs.,* 1905, 7 F. (H.L.) 116.

[3] *Graham's Trs.* v. *Graham,* 1904, 6 F. 1015.

[4] *Graham, supra; Muirhead's Trs.* v. *Muirhead,* 1905, 7 F. 496.

[5] *Dowall* v. *Miln,* 1874, 1 R. 1180; *Brand's Trs.* v. *Brand's Trs.,* 1876, 3 R. (H.L.) 16.

[6] *Nisbet* v. *Mitchell Innes,* 1880, 7 R. 575.

[7] *Reid's Exrs.* v. *Reid, supra.*

[8] *Bell's Tr.* v. *Bell,* 1884, 12 R. 85.

[9] *Nisbet* v. *Mitchell Innes, supra.*

seller and purchaser, but *obiter* by Lord Kyllachy that he would have held them moveable as between heir and executor.

Printing Presses [1] in a pottery in connection with fixed steam heaters, but not themselves fixed.

Spinning Machines [2] in a mill, easily separable, and not specially adapted to the premises: deceased both owner and occupier.

Heritable Securities.— Before most heritable securities were made personal in the creditor's succession for general purposes, all money secured by any kind of heritable security (including *ex facie* absolute dispositions and unexpired adjudications) was (1860) made chargeable with inventory duty.

By the 1868 Act (s. 117) heritable securities (other than *ex facie* absolute dispositions and ground-annuals) were made personal in the creditor's succession unless executors are expressly excluded, and except *quoad* (1) the fisc, (2) the rights of husband and wife, and (3) legitim. But money secured by an *ex facie* absolute assignation of a recorded lease is personal estate.[3]

By the 1874 Act (s. 30) those provisions of the 1868 Act were extended to all real burdens except ground-annuals.

According to the practice of the inland revenue and of the commissary courts, all bonds, securities, and burdens, from which executors are not expressly excluded (but not ground-annuals), fall to be included in the inventory and confirmation.

An apparent opinion was expressed by a majority of a court of seven judges (*diss.* Lord Shand) that the 1868 Act makes heritable securities moveable only in intestate succession.[4] But in a subsequent case where a testatrix directed her trustees to divide the residue of her "moveable means and estate" among certain persons, this was held to include heritable bonds not expressly excluding executors.[5] *Hare's* case raised no substantial question, relating, as it did, to the conveyancing question of completion of title. A heritable bond passed to a substitute trustee, and service was held competent. With respect, that appears to be sound. In that view the case is of importance on the subject of this book. Heritage may at present be disponed to the purchaser and his next of kin, but the executor would complete title by service, not by confirmation. Conversely the deceased's whole personal estate may be bequeathed to his heir in heritage, who would complete title by confirmation, not by service. Securities which are heritable as regards succession will or will not be accounted for by the executor, according to circumstances. Someone must pay estate duty upon them. If the executor does so he will include them, not in the inventory, but in Account No. 4 of the inland revenue form. This includes *ex facie* absolute dispositions, but if, for other reasons altogether, it be preferred to enter these as "heritable

[1] *Bell's Tr.* v. *Bell, supra.*
[2] *Dowall* v. *Miln, supra.*
[3] *Stroyan* v. *Murray*, 1890, 17 R. 1170.
[4] *Hare*, 1889, 17 R. 105.
[5] *Hughes' Trs.* v. *Corsane*, 1890, 18 R. 299.

property" in Account No. 5 there is probably no objection. Feu-duties and ground-annuals are, of course, entered in that account.

Sales and Purchases of Heritage.—If the deceased had sold heritage but had not received the price, his right to the price is personal estate; but less any debt secured on the property. A compulsory or judicial sale has the same effect.[1] If he had purchased heritage, but had not paid for it, his right is heritable; the executor must pay the price, and the heir secures the property.[2] It may be that the property in the hands of the sellers is heavily bonded, but that makes no difference; what the executor must pay is the whole price, not the price less the seller's bonds; and what the heir receives is the property unburdened.[2] But if the deceased's contract was to take the property burdened with the bonds, and to pay only the excess, that is another matter. Indeed, the deceased's contract might have been that he was to receive a sum of money along with the disposition as an inducement to purchase; in that case the heir (assuming he was lucratus at all) would need to take the bare property *tantum et tale*, and allow the cash to go to the executor.

A sale by a bondholder converts the proprietor's interest from heritable to moveable, though the price may not have been received at the proprietor's death.[3] Conversely, foreclosures are purchases by the bondholder, but the exact date at which conversion is operated is not quite clear.

Intestate Succession.—At his death the deceased, A., may have succeeded under the intestacy of some other person, but the administration of the latter's estate may be still pending. If A. succeeded as heir, his right is heritable, unless he has done or sanctioned anything which operates conversion. If A. succeeded as next of kin, or representative of next of kin, the right is personal estate. A widow's preferential £500 out of a mixed estate is proportionately heritable and personal in proportion to the estate, subject to anything which she may have done or sanctioned.

It may happen that intestacy results, not because there is no will, but because its purposes fail in whole or in part. In that case two things result: (1) the intestate estate vests retrospectively as at the testator's death, and his heir and/or heirs *in mobilibus* fall to be ascertained as at his, the testator's, death, though they may have long since died; and (2) the character of the succession as heritable or moveable is determined by reference to the position of matters, not when intestacy is ascertained, but at the testator's death.[4]

Legal Rights.—The deceased may at his or her death have been entitled to unrealised *jus relictæ*, *jus relicti*, or *legitim*. All these are personal estate; as also are any arrears and proportionate payments to date of death in respect of terce and courtesy.

[1] *Macfarlane* v. *Greig*, 1895, 22 R. 405.
[2] *Ramsay* v. *Ramsay*, 1887, 15 R. 25.
[3] *Howden*, 1910, 2 S.L.T. 250.
[4] *Moon's Trs.* v. *Moon*, 1899, 2 F. 201.

Residuary Successions.—The deceased, A., may at his death have had a vested right to an estate, or share of an estate, as universal legatory or sole residuary legatee, or as one of the residuary legatees under B.'s will. The question here depends on whether or not there has been conversion in law, which is not the same thing as actual sale of the assets of B.'s estate. If there has been sale, it may be taken that there has been conversion; but the converse does not hold, for there may have been conversion of the quality of the successor's right from heritable to personal without sale of the assets.

No Trust.—The simplest case is where there is no trust of B.'s estate. If the deceased, A., was B.'s universal legatory, then, immediately on B.'s death, his assets become A.'s assets, and the question simply is—what were the assets at A.'s death? subject, indeed, to any contract for sale which A. may have made. If the deceased, A., was one of, say, two direct legatories without a trust, the position is still essentially the same.

Trust Estates.—This is where the question of conversion or no conversion may be difficult, namely, when the deceased, A., died with a vested right under B.'s will to B.'s residuary estate or a share of it. If the trust assets are all personal, the right is personal. If the trust assets are wholly heritable, the right may be wholly heritable, or wholly personal. If the trust assets are mixed, the right may be wholly personal, or partly both in proportion to the assets. It has been said that the test is whether the testator intended the beneficiaries to take land or money. The following rules may generally help:—

1. A direction to sell (or "trust for sale") operates conversion before as well as after sale, and sale or no sale.[1]

2. If, instead of an absolute and unqualified trust or direction for sale, the right to sell is made to depend on the discretion or will of the trustees, or is to arise only in case of necessity, or is limited to particular purposes, as, for instance, to pay debts, or is not, in the appropriate language of Lord Fullarton in the case of *Blackburn*,[2] "indispensable to the execution of the trust," then in any of these cases, until the discretion is executed, or the necessity arises and is acted on, or after the particular purposes are answered, or if the sale is not indispensable, there is no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable.[3]

3. It is reasonable to assume that the presence or absence of an express power of sale will now have less effect since that is in ordinary cases an implied power under s. 4 of the Trusts Act, 1921.

4. If or so far as there has been actual sale before the death of a beneficiary, to that extent at least his share is converted.

[1] *Buchanan* v. *Angus*, 1862, 4 Macq. 374—*per* Lord Cranworth, quoted in *M'Conochie's Trs.* v. *M'Conochie*, 1912 S.C. 653.

[2] *Advocate-General* v. *Blackburn's Trs.*, 1847, 10 D. 166.

[3] *Buchanan* v. *Angus*, *supra*, *per* Lord Chancellor Westbury, also quoted in *M'Conochie*.

5. The word " pay " (even without any other word) is not conclusive in favour of conversion.[1]

6. Nor the mere fact that there is a large number of beneficiaries.[2]

7. But the fact that the trustees have to settle with beneficiaries at various dates (*e.g.* majority respectively) is very strong in favour of conversion, for the court will not contemplate putting the trustees in the position of holding *pro indiviso* with certain of the beneficiaries.[3]

The following rules of a special nature should be noted :—

8. Conversion operates only for the purposes of the will, and has no effect if intestacy results (see p. 109).

9. A. is the testator. B. is the original beneficiary. B. dies before division. It may in peculiar circumstances happen that B.'s right is heritable even though the fund is moveable, and thus his heir, C., succeeds ; but if C. also dies before division, the right may be personal in him ; see *dicta* in *M'Conochie, supra.*

10. Although the will operates conversion of heritage to moveables without a sale, the beneficiaries may notionally *re*convert to heritage.[4]

11. In commissary practice where an estate consisted originally of heritage and moveables, and the trustees had realised the moveables and employed the proceeds in paying off debts on the heritage, on the death of a beneficiary before the period of division it was held that his interest in the succession had become wholly heritable (*Crosby*, 2 Feb. 1887).

Legacies.—The deceased may at his death have had a vested right to a legacy under the will of some other person, but that legacy may not have been received before the death of the deceased, either because there was not time, or because the term of payment had not arrived, or because the legacy is reversionary. If the legacy is specific, its character as heritable or moveable depends on the character in that respect of the specific thing bequeathed. If the legacy is general—of so much money—the right is personal estate though the assets of the testator's estate may be all heritable.

Partnership Interest.—Heritable or real property, whether at home or abroad, forming part of the assets of a United Kingdom business,[5] is personal *quoad* the succession of the partners, unless the contrary intention appears.[6] Indeed, in the case of a Scottish partnership, which is a separate *persona*—differing from the legal position in England and Ireland—the partners have no direct relation to the property, which simply goes into

[1] *Anderson's Exr.* v. *Anderson's Trs.* 1895, 22 R. 254 (held heritable).

[2] *Henderson's Trs.* v. *Henderson*, 1907 S.C. 43 ; *Duncan's Trs.* v. *Thomas*, 1882, 9 R. 731 (52 beneficiaries).

[3] *Henderson's Trs.* v. *Henderson*, 1907 S.C. 43—*per* Lord M'Laren, and cases cited.

[4] *Hogg* v. *Hamilton*, 1877, 4 R. 845.

[5] The word " business " is used instead of partnership in view of the Lords' opinions in *Laidlay's Trs.* v. *Lord Advocate*, 1890, 17 R. (H.L.) 67.

[6] Partnership Act, 1890, s. 22.

the general account, and the partner's interests are claims to proportionate shares of the balance on that account.

Dominion Business.—Probably it will be found that the result is the same as in an English partnership, as stated above. This, however, is very important when the partner is domiciled in the United Kingdom, for, if the right is personal, estate duty will be payable in the United Kingdom; if not, no. Note the words "unless the contrary intention appears" in s. 22 of the Partnership Act; and consider the effect of pars. (1) and (2) of s. 2 of that Act.

Foreign Business.—These questions may in such cases be even more important than in dominion cases.

As to local situation, see p. 132, and valuation, p. 141.

General Powers.—By an Act of 1860 [1] it was enacted that all personal estate which any person should have disposed of by will, under any authority enabling him to dispose of the same as he should think fit, should be deemed to be his personal estate, in respect of which the inventory of personal estate is exhibited and recorded in Scotland; and the duty is made a charge on the property disposed of. But the power must have been general and not merely special, *i.e.* a power to divide among a class. It must be remembered that a general power is hardly distinguishable from a right of property. A general power of disposal, whether of an indefinite fund or of a specified sum, or of a sum within specified limits,[2] may be exercised by a general will which is earlier in date than the power,[3] does not bear to exercise it, does not refer to it, does refer to other powers, purports only to deal with "my estate," and operates through trustees; and though in the deed creating the power there is a destination over failing the exercise of the power.[4] *Quaere* if the testator did not know of the power.[3]

A holograph will, valid by the law of Scotland, though not by that of England, executed in England by a domiciled Englishwoman, has been held to be an effectual exercise of a power of disposal under a Scottish deed.[5] Where a power of disposal under a marriage-contract had been exercised, but its operation was contingent on an event which had not happened, and might not happen, a note was appended to the inventory to the effect that an additional inventory would be given up should the exercise of the power become operative (*Rennie*, 15 March 1866). Where the person having the power of disposal of certain funds exercised it by a special writing directing the trustees who held the funds to divide them, the executors under her general will of same date, who were the same persons as the trustees, included the funds in the inventory and confirmation (*Wyllie*, 19 March 1881). By the Finance Act, 1894, funds over which

[1] 23 Vict. c. 15. ss. 4, 5.

[2] *Mackenzie* v. *Gillanders*, 1874, 1 R. 1050 (held not exercised).

[3] *M'Tavish's Trs.* v. *Ogston's Exrs.*, 1903, 5 F. 641.

[4] *Bray* v. *Bruce's Exrs.*, 1906, 8 F. 1078.

[5] *Kennion* v. *Buchan's Trs.*, 1880, 7 R. 570.

the deceased had a power of disposal are subject to estate duty whether the power has been exercised or not.

Resulting Trusts.—When the contractual purposes of any *inter vivos* settlement are fulfilled or have failed, there is a resulting trust for the settlor. This is seen most frequently under marriage contracts. If the wife's estate has been settled upon trusts for herself for life, then for her husband for life, and finally on the issue of the marriage surviving both spouses and attaining majority or marrying, then if issue never exist, or predecease the wife, or otherwise fail to attain a vested right, there is a resulting trust for the wife. It matters not that the failure is not ascertained till after her death, as when issue survive her but afterwards predecease vesting—though of course in that case the right cannot be included in any inventory given up at her death; an additional grant will be required later. Nor does it matter that her husband survives her and takes a life interest; if the failure of the fee is then evident, there is then a present resulting trust though with postponed enjoyment, in fact a reversionary interest, as to which, see p. 144 (*Bruce*, 9 April 1877; *Kellie*, 3 May 1889). Nor does it matter whether the resulting trust arises simply from exhaustion of the express trusts, or whether there is an express recognition of the right of the settlor to deal with the fund *inter vivos* or *mortis causa*, failing the contractual trusts. In ordinary cases the provisions which are within the marriage consideration are those in favour of the other spouse and the issue of the marriage, and any other trusts are testamentary and revocable. But this is not absolute. Thus where children of the marriage and those of a former marriage were put on the same platform, the provisions in favour of the children of the former marriage were held to be contractual and irrevocable.[1] The contrary was held when the wife had in the marriage contract settled her estate upon the husband's children of a previous marriage, but only failing children of the intended marriage.[2]

But so far as not disposed of under the contractual trusts the fund, or the right to it, is *in bonis* of the settlor, and, if personal in quality, falls to be entered in the inventory. Thus where a provision was made by a wife, in an antenuptial contract, that the property conveyed by her to trustees should, on the death of the surviving spouse, and failing children, be divided between her brother and sister, and she survived without children, it was held by Lord Gifford [3] that she could recall the destination, and the fund was accordingly included in her inventory and confirmation (*Jamieson*, 1 March 1871). In a similar case, where the wife had directed trustees to convey the funds contributed by her to her next of kin, but reserving a general power of appointment, the inland revenue held that the funds fell to be included in her inventory (*M'Gaan*, 12 April 1883).

[1] *Mackie* v. *Gloag's Trs.*, 1884, 11 R. (H.L.), 10; *Leslie's Trs.* v. *Leslie*, 1921 S.C. 940.

[2] *Montgomerie's Trs.* v. *Alexander's Trs.*, 1911 S.C. 856.

[3] Interlocutor dated 13 Dec. 1870, not reported.

When the value of personal estate disponed in security of marriage-contract provisions is more than sufficient to meet them, the surplus is executry of the settlor (*Clerk*, 10 March 1868 ; *Mathison*, 26 May 1879).

Resulting trusts require to be distinguished from proper ultimate testamentary trusts in marriage contracts. These are very common, though they have caused many difficulties, and the practice of inserting them has been condemned from the bench. Thus in an antenuptial trust the intended wife, after proper matrimonial purposes, directed that, failing them, the funds should go to her " heirs or assignees." On this Lord President Inglis said :—

> If the estate be heritable, it would go to the heir ; it it be moveable, it would go to the heirs *in mobilibus* ; and if it be partly the one and partly the other, it would be divided accordingly. But it would be quite a mistake to suppose that because that effect is given to these words, this is a case of intestacy. The heirs or assignees do not take by reason of failure of the deceased to make any will ; on the contrary, they take by the operation of the will. They take as conditional institutes after the children, and as such they are entitled to uplift and possess the estate under the title of a disponee, *and not under a title made up by confirmation or service.*[1]

In such a case as *Brown's*, various events may be figured. Thus (1) the wife might sell the reversionary interest, in which case the purchasers would be owners and irrevocable " assignees," and would at the proper time get over the estate from the marriage trustees, and of course without confirmation. (2) She might make a general will, which would supersede the ultimate trust and carry the reversion of the trust funds to the testamentary executors,[2] who would require confirmation. (3) She might make a direct testamentary gift to X. of the marriage trust funds, in which case X. would be a special assignee and need no confirmation. (4) She, having been domiciled in Scotland when she made the destination, might die domiciled out of Scotland, in which case the law of Scotland would determine who are her " heirs," as *Brown* shows. (5) If the destination to " heirs " holds, the husband is excluded, and the heirs are special assignees, and (on the authority of Lord President Inglis) do not require confirmation.

Special Titles and Destinations.—It is very common to find people making purchases and investments in the name of other people (*e.g.* their children), or taking a joint title in name of self and some other person (*e.g.* wife) and survivor, or taking the title to self with a substitution. Assuming the deceased to have done these things, then, according to circumstances, the following questions may arise : (1) whether the deceased retained control, or whether he was divested in his lifetime in favour of whom we may call the donee ; (2) whether, if entitled to alter, he has done so ; and (3) whether, assuming that he could have, and has

[1] *Brown's Trs.* v. *Brown*, 1890, 17 R. 1174.

[2] *Duff's Trs.* v. *Phillipps*, 1921 S.C. 287.

not, altered, the property, being personal, ought to go into the inventory with a view to confirmation.

1. *Power to Alter.*—This is excluded by (1) delivery, or infeftment in the case of heritable securities, *i.e.* delivery to, or infeftment of, the donee or a trustee for him,[1] but as to infeftment, see the narrow case of *Cameron*,[2] doubted in *Carmichael, infra*; (2) a *jus quæsitum* in the donee[3]; (3) a contractual destination;[4] (4) English law, when a joint tenancy is created by a joint investment, and cannot be severed by will though it can be by *inter vivos* act. This is understood to apply to English investments by Scotsmen. Subject to those important exceptions a purchase or investment in name of another does not place the property *ex bonis* of the purchaser or investor, whether the donee's name appears alone, or jointly with the investor's, or by way of substitution to him.

2. *Alteration or Not.*—This generally takes the form of the question whether the special titles and destinations have been revoked by a general will. We are here dealing only with investments made by the deceased himself, and there the presumption is that they are not revoked, whether they are earlier or later than the general will.[5] But it appears that a wide clause of revocation may revoke prior special titles.[6]

3. *Special Assignation and Confirmation.*—Assuming that the special titles and destinations stand, they are complete to the donees as titles without the aid of confirmation. They really do not pass to the executor as such, or at all. So far, therefore, as these special titles and destinations operate, the assets should be entered in the accounts annexed and not in the inventory. This applies to such a variety of investments as heritable bonds, personal bonds, debentures, stocks, and shares,[7] but it does not apply to bank deposit receipts or bank accounts (pp. 117, 119). In any case the whole asset is *in bonis* of the deceased during his life and at his death.[8] The executor is liable to pay the estate duty on it, with relief. In any statement of the deceased's estate for *jus relictæ*, *jus relicti*, or *legitim*, or for any other distributive purpose, the whole value of the asset must be brought *in computo*. But, nevertheless, the special title or destination operates. Different cases require to be distinguished; thus (1) if the title was to the deceased in liferent, and to the donee, X., in fee, X. takes the whole, and there is nothing requiring confirmation; (2) the like if the title was in name of X. only; (3) the like if the title was in name of the deceased and X. and the survivor; (4) if the title was in name of the deceased and X., without mention of survivorship, half goes to X., and can be excluded from the confirmation, and the other half goes to the executor who confirms to it; (5) but in the last case X. takes the whole if English law applies.

[1] *Walker's Exr.* v. *Walker*, 1878, 5 R. 965.

[2] *Cameron's Trs.* v. *Cameron*, 1907 S.C. 407.

[3] *Carmichael* v. *Carmichael's Exrx.*, 1920 S.C. (H.L.), 195.

[4] *Perrett's Trs.* v. *Perrett*, 1909 S.C. 522.

[5] *Drysdale*, 1922, S.C. 741; *Perrett, supra.*

[6] *Drysdale, supra* (by admission).

[7] *Connell's Trs.* v. *Connell's Trs.*, 1886, 13 R. 1175.

[8] *Walker's Exr.* v. *Walker, supra.*

Nominations.—These are a form of gift or title often met with in the case of small sums in savings banks or other institutions, such as assurance and provident funds. They are certainly special assignations *quoad* title, just as survivorship deposit receipts, but it is quite a different question whether they confer a beneficial right and oust the successor at law, and for negative answers to the latter question see the Friendly Societies Act, 1890 (s. 60) and *Young* v. *Waterston*.[1] (Chap. XX.)

Deposit Receipts.—It has been suggested that this matter should be dealt with at some length owing to its recurrent practical importance.

With the Bank.—The bank is entitled, and bound, to act upon the terms of the deposit receipt. If the deceased has taken a deposit receipt in name of B., and if, after the depositor's death, or during his life, B. presents the receipt, endorsed by himself, for payment, the bank is safe to pay. The same applies to a deposit receipt taken by the deceased, A., in name of himself and B. and the survivor, when endorsed by B. after A.'s death. The same applies to a deposit receipt taken by A. in name of himself and B., "or either or survivor" (a very favourite form) if endorsed by B., and presented either during A.'s life or after his death.

Authority for these propositions sufficiently appears from the cases of *Anderson*[2] and *Allan*.[3] In *Anderson* the deposit receipt was in name of A. and B., "either or survivor." After its date the bank granted credit to A. B. claimed payment of the deposit receipt, and sued with A.'s consent. The bank refused, and claimed to hold the deposit receipt against B. and in security of A.'s debt. The bank lost, on the ground that, having undertaken to pay to B. ("either"), they could not set up, against that, a debt of A.'s which they had subsequently created.

In *Allan* the deposit receipt was in name of A. and B., "either or survivor." Arrestment in bank's hands against A. The bank subsequently paid to B. The arrester sued the bank for the money and won. This was on the ground that, for all that appeared on the deposit receipt, the money might be wholly A.'s (in fact it was neither really A.'s nor B.'s), and therefore the arrestment might attach the whole. Besides, the bank had a good deal of knowledge of the facts behind the scenes. An assignation by one of the parties, intimated to the bank, would have the same effect.

But in the ordinary case the party appearing on the deposit receipt can get the money if he has the deposit receipt. The executor may be advised to interpel payment.

Beneficial Right. This is not touched by anything that has been said. The real right remains behind. "A deposit receipt is not a document of title, and no inference can be drawn from the terms in which the money is deposited as to the ownership of the money."[4]

[1] 1918 S.C. 9.

[2] *Anderson* v. *North of Scotland Bank*, 1901, 4 F. 49.

[3] *Allan's Exr.* v. *Union Bank*, 1909 S.C. 206.

[4] *Per* Lord Low in *Allan*, *supra*.

Legacy.—A deposit receipt cannot make a legacy.[1] If expressed to be in favour of "A. (the depositor), whom failing, B.," and found at A.'s death, it would not be a special destination of the money to B. The same holds of the more common forms already mentioned. Neither the "either" or "survivor" is testamentary. The same holds of a deposit receipt taken by the deceased in name of a third party. Of course cases like these are totally different from such cases as are referred to on p. 39, where a will may be written on the back of a deposit receipt.

Donation.—This is what it must come to, if anything. The donation may be *inter vivos* or (more commonly tried) *mortis causa*. There is a strong presumption against both.[2]

1. *Inter vivos.*—There must be delivery, but as to what may constitute delivery see the next paragraph and *Boucher*[3] and cases there cited. Evidence of intention to donate is essential. It may be verbal. The unsupported evidence of the donees will not do.[4] The delivery to a donee of an endorsed receipt may not be enough,[5] for there must be evidence of the intention to make a gift. If donation *inter vivos* is made out, the money does not appear in the inventory. Nor does it appear in the relative "accounts" unless the gift was made within three years of death, and not even then if falling within the exceptions in s. 59 (2) of the 1909–10 Finance Act, one of which is gifts not exceeding £100 to each donee.

2. *Mortis causa.*—It may now be taken that the donation need not be in immediate contemplation of death.[6] There has been great diversity of opinion on the point whether delivery is necessary, but it appears to be cleared up by Lord Dunedin's opinions in *Brownlee*[7] and *Hutchieson*.[8] His lordship there shows that there must be two separate things: (1) delivery; (2) *animus donandi*; and separate proof of both, but then it appears that the entry of the donee's name in the bank's books and on the deposit receipt (joint deposit receipt)[9] or the endorsation (where the donee's name is not already on the deposit receipt) is equivalent to delivery, and the case will be complete if the intention to make the gift is proved. It is right to note, however, that there is much authority to the effect that delivery is not necessary.[10] On the question of the *animus donandi* the terms of a joint deposit receipt are important, for they show that mere custody of the money by the bank was not all that was in contemplation.[11] The donee's evidence alone is not sufficient, but it may be sufficiently

[1] *Jamieson* v. *M'Leod*, 1880, 7 R. 1131.

[2] *Dawson* v. *M'Kenzie*, 1891, 19 R. 261.

[3] *Boucher's Trs.* v. *Boucher's Trs.*, 1907, 15 S.L.T. 157.

[4] *M'Nicol* v. *M'Dougall*, 1889, 17 R. 25.

[5] *Sharp* v. *Paton*, 1883, 10 R. 1000.

[6] *Blyth* v. *Curle*, 1885, 12 R. 674.

[7] *Brownlee's Exrx.* v. *Brownlee*, 1908 S.C. 232.

[8] *Hutchieson's Exrx.* v. *Shearer*, 1909 S.C. 15.

[9] *Crosbie's Trs.* v. *Wright*, 1880, 7 R. 823; *Blyth* v. *Curle*, *supra*; Lord M'Laren (Ordinary) in *Sharp* v. *Paton*, *supra*.

[10] *Crosbie's Trs.* v. *Wright*, *supra*; *Scott's Trs.* v. *Macmillan*, 1905, 8 F. 214, and cases cited.

[11] *Crosbie's Trs.* v. *Wright*, *supra*.

supported by the facts without other parole proof.[1] It is favourable to donation if the deposit receipt is the last of a series in similar terms and increasing amount [1]; *contra* if decreasing.[2] It is important against donation *mortis causa* if the result would be to leave too little estate to carry out a will.[1] Otherwise there is no presumption that donation *mortis causa* is revoked by a later will.[3]

If donation *mortis causa* is made out, the money does not appear in the inventory, but it does appear in the accounts annexed, without limit of date.

Failing Donation, the question is—whose was the money? and the answer rules the rights of parties. Deposit receipt in name of husband and wife and survivor; no donation proved; proved that the money was all the husband's, it remains his; proved that half was provided by each, half is the widow's and half goes to the husband's executors. There is a presumption for equality.[4]

Fixed Deposits.—Almost all the cases have reference to ordinary deposit receipts of Scottish banks, payable on demand. But, though certainly all the considerations have not the same application, the same rules apply to fixed deposit receipts for a period of years with dominion banks and with investment companies.[5] They might even apply to interim receipts pending the preparation of a debenture.

English Law.—The difference here is that, when two names appear, survivorship, though not expressed, is implied as to both title and right: that has been held to apply to English investments by a man domiciled in Scotland,[6] but there is also some authority to the contrary.[7]

Entry in Inventory.—This may run somewhat as follows:—

Sum of £100 in d/r of the X. bank, dated at its office in on in name of the deceased and B [*design*] expressed to be payable to them or either or the survivor, which sum of £100 was wholly the deceased's money, and remained his money £100
Interest thereon to date of death 5

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Valuation.—What has been said above, and more especially a study of the case law, shows how troublesome those questions are, the amount of litigation which may be required, and the uncertainty of the result. Then if the other party cashes the deposit receipt, there is the risk of his insolvency. On the other hand it is not clear that he is bound to endorse the deposit receipt for the executor's accommodation, and without his endorsation the bank may require an indemnity, for which a premium may have to be paid to an insurance company. With litigation, and even

[1] *Crosbie's Trs.* v. *Wright, supra.*
[2] *Jamieson* v. *M'Leod, supra.*
[3] *Crosbie's Trs.* v. *Wright, supra*; *Scott's Trs.* v. *Macmillan, supra.*
[4] *Trotter* v. *Spence*, 1885, 22 S.L.R. 353.
[5] *Macfarlane's Trs.* v. *Miller*, 1898, 25 R. 1201.
[6] *Connell's Trs.* v. *Connell's Trs.*, 1886, 13 R. 1175.
[7] *Dinwoodie's Exrx.* v. *Carruther's Exr.*, 1895, 23 R. 234.

without, it may be a considerable time before the money can be uplifted, and meantime it may be bearing a low rate of interest. Taking all these considerations into account, there arises a serious question of the fair value (if any) to be put on the asset in the inventory. That depends on the assessment of what price the executor's claim would fetch in the market on the day of the death if then exposed to sale. Reference is made to s. 7 (5) of the 1894 Finance Act, and to the discussion of it in chap. IX ; but the answer cannot possibly be par, nor perhaps anything like it.

Bank Balances.—The position is much the same as in the case of deposit receipts. No heading to the account will amount to a legacy, but there may be donation *inter vivos* or *mortis causa.*[1]

Life Policies.—Nowadays it hardly requires authority to prove that a policy of assurance effected by a person on his own life, payable to his "executors, administrators, and assignees," or in any similar terms, forms on his death part of his executry estate.[2] But life policies are effected in all manner of ways, and many questions regarding them come up for consideration in commissary practice. The following are illustrative instances :—

1. A policy effected by a husband on the life of his wife, payable to her "heirs, executors, successors, and assignees," was, on her predecease, held to belong, not to the husband, but to the heirs *in mobilibus* of the wife.[3]

2. A similar policy, where the husband predeceased, having during his life used it as a fund of credit to obtain advances from the company, was held, in a competition between his trustees and his widow, to belong to her. "It is immaterial who pays the premium, or on whose life the policy is taken. The material point is, in favour of whom is the beneficial obligation undertaken by the company."—*per* Lord Justice-Clerk Moncreiff.[4]

3. A policy was taken by a husband on his wife's life, payable to certain parties as trustees for him, and to "their executors, administrators, or assigns." The husband predeceased. The policy was held to form part of his estate.[5]

4. Policies were taken upon a son's life by a father, for behoof of himself and spouse, payable to both, "or to the survivor of them, their, his, or her heirs, executors, or assignees." From a mutual will between the spouses it was evident that the policies were intended neither as a donation nor a provision to the wife, but for the benefit of the son and his family.

[1] Donation—*Blyth* v. *Curle*, 1885, 12 R. 674 ; *Boucher's Trs.* v. *Boucher's Trs.*, 1907, 15 S.L.T. 157. No donation—*Thomson* v. *Dunlop*, 1884, 11 R. 453 ; *Taggart* v. *Higgins' Exr.*, 1900, 37 S.L.R. 843 ; 1900, 8 S.L.T. 139.

[2] *Muirhead* v. *Muirhead's Factor*, 1867, 6 M. 95.

[3] *Smith* v. *Kerr and Others*, 1869, 7 M. 863.

[4] *Thomson's Trs.* v. *Thomson*, 1879, 6 R. 1227.

[5] *Pringle's Trs.* v. *Hamilton*, 1872, 10 M. 621.

The husband was the first deceaser. It was held that the policies formed part of his estate, according to their actuarial value.[1]

5. A widow effected a policy on her own life in favour of her son, and paid the premiums. The policy was not included in her inventory, and was paid to the son without confirmation (*Fernie*, 7 Sept. 1870).

6. A policy taken by a wife on her husband's life, payable to herself, was naturally held not to form part of the husband's estate, and was paid to the widow without confirmation (*Grant*, 2 May 1872).

7. A policy taken by a husband on his own life in favour of trustees for behoof of his wife and the children of the marriage, does not create a vested right in the beneficiaries without delivery, actual or constructive, of the policy; the same rule being applicable to such a policy as to other investments taken with a special destination.[2] This policy was not under the Married Women's Policies of Assurance Act.

8. But when the policy has been delivered, the husband is divested, and the policy does not form part of his estate; but should the wife (the intended beneficiary) predecease him, it may revert to him, as having been a provision for her under the implied condition of her survivance.[3]

9. Even without delivery, and even though not under the Married Women's Policies of Assurance Act, the policy, if in favour of, say, the assured's wife, will, on his death, operate as a special assignation.[4] The wife's title is complete without confirmation. That could not be so in *Jarvie*,[5] which was a case with creditors.

10. The proposal for insurance bore that it was to be "in favour of wife." The policy was in husband's name, with signed memorandum that it was payable to the wife if she survived. That memorandum appeared to be deleted. The policy had been delivered and redelivered.[5] The wife survived. The policy was held to be hers. This was a very special case.

11. A policy was effected in name of a son on his own life. The father paid the premiums and retained the policy in his possession continuously till his death twenty-five years after the date of the policy. In his will he referred to it as his, and it was held to be his.[6]

12. A father effected a policy on the life of his son, a pupil. It bore that the father was to pay the premium till the son attained majority; that if the son died a minor the premiums would be refunded to the father; that the father could surrender during the son's minority; and that if the son chose to continue the premiums after majority, £1000 would be payable to him on his death; also on majority certain options were exercisable by him. The father paid the premiums during minority. The son died in his twenty-second year, paid nothing, and exercised no option. The father had possession. In a competition between the father

[1] *Chalmers' Trs.*, 1882, 9 R. 743.

[2] *Jarvie's Tr.* v. *Jarvie's Trs.*, 1887, 14 R. 411.

[3] *Craig* v. *Galloway*, 1861, H.L., 4 Macq. 267, 23 D. 12.

[4] *Dickie's Trs.* v. *Dickie*, 1892, 29 S.L.R. 908.

[5] *Hay's Trs.* v. *Hay*, 1904, 6 F. 978.

[6] *Hadden* v. *Bryden*, 1899, 1 F. 710.

and the son's executrix the latter was preferred on the ground that the son had a *jus quæsitum* in the policy.[1]

Where the nature of the insurance is such that the person whose life is insured, and by whom the policy is maintained, has no power to dispose of its contents, it is held to form no part of his estate. On this ground a policy of insurance on the life of a teacher in a hospital, the governors of which reserved to themselves the right of disposing of it as they thought proper (*Wilson*, 8 April 1863),—a sum falling due from the "Fund for Ministers' and Professors' Widows" (*Wallace*, 20 Dec. 1866)—the deceased's interest in "The Protestant Union of London," divisible by him only among his children (*Watson*, 2 Jan. 1879)—and a sum due to the representatives of the deceased by the "Customs Annuity and Benevolent Fund"[2]—were held exempt from duty, and payable without confirmation, though all now subject to estate duty under the Finance Act, 1894.

By the Revenue Act of 1889 (s. 19) it is provided (and it is still law) that where a policy of life assurance has been effected with any insurance company by a person who dies domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a court in the United Kingdom is not necessary to establish the right to receive the money payable in respect of the policy. The effect in England and Ireland was that the policies were exempted from the duty payable upon probates and letters of administration, and the board of inland revenue adopted the view that such policies must also be held to be exempted from the duty payable upon inventories in Scotland. But it is held that such policies are not exempt from estate duty if either the head office of the company is in the United Kingdom or the policy is expressed to be payable at a branch office in the United Kingdom, and where duty is payable it appears that the company is responsible to retain enough to meet it. But the 1889 enactment remains in force to the effect of dispensing with a United Kingdom grant of representation.

Married Women's Policies of Assurance Act, 1880.—Under s. 2 a married man, including a widower,[3] may effect a policy, including an endowment policy,[4] on his life for the benefit of wife or children or both, and it may be with reserved right to regulate vesting and payment.[5] These policies are protected against creditors, and this is done by the statutory declaration that they constitute a trust in the husband or any trustees appointed for the beneficiaries. There is, therefore, no question of delivery. If trustees are appointed they have a title without confirmation, but they will have to pay the estate duty. If no trustees are appointed the trust passes on the husband's death to "his legal representatives," that is, his executors, whether nominate or dative, and a title can be completed by including the policy in a note

[1] *Carmichael* v. *Carmichael's Exrx.*, 1920 S.C. (H.L.) 195.

[2] Tilsley's Stamp Laws (2nd ed.), p. 684.

[3] *Kennedy's Trs.* v. *Sharpe*, 1895, 23 R. 146.

[4] *Chrystal's Tr.* v. *Chrystal*, 1912 S.C. 1003.

[5] *Dickie's Trs*, v. *Dickie*, 1892, 29 S.L.R. 908.

to the inventory and confirmation. The wife's interest is forfeited on divorce at the husband's instance, at least if the policy has not been delivered to her,[1] and if she is the only beneficiary the policy then becomes the husband's absolute property.

Liferents.—The Apportionment Act is applicable to all periodical payments in the nature of income, and therefore it usually regulates the share of interests and dividends falling to a liferenter of moveable as well as heritable estate. But a direction to pay dividends "as received" excludes apportionment;[2] and see Preference Dividends.

Ordinary bonus dividends, more or less habitually paid as part of the distribution, go to the liferenter. Special bonuses in connection with the issue of additional capital may[3] or may not[4] go to the liferenter.

As to apportionment between capital and income, where shares have been sold during the currency of a term, the liferenter's interest may be, not the proportion of the dividend actually earned at the close of the term, but a proportion of what the dividend was expected to be at the date of the sale.[5] Or apparently it may be *nil*, which would appear to result on the analogy of an Outer House decision refusing (in accordance with the English practice) to hold that capital was entitled to any part of the first dividends received after investment.[6]

Preferential Dividends.—It is thought that the practice in Scotland does not (yet) accord with the important decision of the Court of Appeal in England regarding the true nature of so-called "arrears" of cumulative preferential dividends. When lean years are followed by a full year, and the arrears are paid up, it is believed that the practice is to allot the dividends, when received, to the past years. But it appears that the true view may be that, as there can be no dividend except out of profits, there cannot really be "arrears" in such a case, and that the dividend, though amounting to enough for, say, three years, is all income of the year of distribution or earning.[7]

Rents.[8]—1. *Arable Farms.* The farm year runs from Martinmas to Martinmas. The rent of each crop is legally payable one-half at Whitsunday after sowing, and the other half at Martinmas after reaping. The deceased owner takes all rent legally due on or before the date of his death, however much conventionally postponed, and an apportioned[9] part of the next half-year's payment, corresponding to the number of days of his survivance after the last Whitsunday or Martinmas which occurred in his lifetime.

[1] *Wallace* v. *Wallace*, 1916, 1 S.L.T. 163.

[2] *Macpherson's Trs.* v. *Macpherson*, 1907 S.C. 1067.

[3] *Blyth's Trs.* v. *Milne*, 1905, 7 F. 799.

[4] *Howard's Trs.* v. *Howard*, 1907 S.C. 1274.

[5] *Cameron's Factor* v. *Cameron*, 1873, 1 R. 21.

[6] *Gardiner Baird*, 1907, 15 S.L.T. 25.

[7] *Wakley* v. *Vachell*, 1920, 36 T.L.R. 325.

[8] 33 & 34 Vict. c. 35.

[9] See generally Rankine, Leases.

2. *Pasture Farms.*—The farm year is Whitsunday to Whitsunday. The rent of each year, Whitsunday to Whitsunday, is legally payable one-half at Whitsunday and the other half at Martinmas. This is not forehand for a grass rent. The deceased owner takes as in No. 1, but it works out differently owing to the different farm year. Suppose tenant enters at Whitsunday 1923 and owner dies on 15 August 1924. There are vested in the owner the half-year's rents legally payable at Whitsunday 1923, Martinmas 1923, and Whitsunday 1924, so far as not actually received by him in his lifetime, and no matter how much conventionally postponed, *plus* a proportion corresponding to the period 15 May–15 August 1924.

Forehand Rents.—Even here the Act operates. It may lead to giving the deceased part of a rent paid for a crop which was not sown till after his death. He gets everything conventionally payable during his lifetime, *plus* a proportion corresponding to the number of days by which he survived the last term of payment in his lifetime.[1]

Grass Parks.—If let for the whole year the rule appears to be the same as in grass farms. If let for the season the whole has in commissary practice been held to vest in the proprietor at the date of the roup (*Brodie*, 2 Nov. 1888). If payable on that date or in his lifetime it is all *in bonis* of him at his death, whether received or not; but if not payable till after his death it appears that the Apportionment Act should apply.[2]

Crofts.—It appears that the rents of crofts and pendicles vest *de die in diem* as from the term of entry, and the proportion of rent applicable to the period during which the proprietor survives that term, so far as not received by him in his lifetime, goes to his executors (*Mathison*, 26 May 1879).

Sporting Rights.—The circumstances vary greatly, for there may be a joint lease of house and shootings, etc., and either may be the predominant element. See Rankine's Leases, 354, and cases (seller and purchaser) cited.

Urban rent accrues from day to day like the interest of money.[3] But if payable in advance the deceased benefits. Industrial works appear to be in the same position, if there is a termly rent, but if it takes the form of royalties the deceased's right may be measured by the state of the working at his death, or disposal of produce at that date.[4]

Dates.—Take 15 May and 11 November, the dates of the money terms, though the entry may be different.[5]

Title to Discharge.—The proprietor at the date when rent becomes payable is the person entitled to receive the rent from the tenant and to give a receipt. It may be that a part or the whole has to be passed on to

[1] *L. Herries* v. *Maxwell's curator*, 1873, 11 M. 396.

[2] Generally see *Tennent's Exrs.* v. *Lawson*, 1897, 35 S.L.R. 72; 1897, 5 S.L.T. 164.

[3] *Tennent, supra.*

[4] *Lennox v. Reid*, 1893, 21 R. 77.

[5] *Balfour's Exrs.* v. *Inland Revenue*, 1909 S.C. 619 (land); *Jameson's Factor*, 5 Jan. 1892, Lord Low, not reported (houses).

the previous owner, or his representative, but that does not concern the tenant.[1] Thus in the cases we are considering, where there is intestacy, the heir is the tenant's creditor, and the executor is the creditor of, or beneficiary under, the heir, for what was *in bonis* of the deceased, for the collection of which a title by confirmation is, strictly, required.

Loans and Advances.—Where the deceased has in his will given his trustees a discretion to discharge a debt without consideration, or to enforce it, the debt forms part of his estate at his death (*Scotland*, 14 July 1876; *Dalziel*, 20 April 1880). The same would hold though the clause in the will absolutely directed discharge, or was itself a direct discharge. This is obvious on principle, for the question is, not what the testator may have been pleased to do or order in his will as to the disposal of his estate after his death, but what estate was at his death at his disposal. In like manner advances to children or other beneficiaries under a deceased's testamentary writings fall to be included in the inventory when acknowledgments have been taken under which the moneys would be recoverable as debts, but not where the testator was divested without any title to recover during his lifetime, though the amount of the advance may have to be brought into account against the receiver of it in the distribution of the estate, either because it was so conditioned when the advance was made or because the testator has so directed in his will.

Stipend and ann, whether payable out of the teinds, or, as in Edinburgh, in the form of a salary provided by statute, are not affected by the Apportionment Act, but are still regulated by the Act of 1672, c. 13,[2] under which if the incumbent survive Whitsunday, half of that year's income is stipend and the other half is ann; and if he survive Michaelmas the whole year's income is stipend, and ann is half of the following year's income. The executors of a minister, therefore, have right only to the stipend due at Whitsunday or Michaelmas immediately preceding his death, the stipend for the half-year current being ann, which does not form part of his executry or appear in the inventory or confirmation. A surrender of stipend to an assistant carries only what has vested in the minister.[3]

Building Societies.—Shares in a building society are personal, but where the holder has obtained an advance from the society against the shares and on the security of heritage, his interest becomes entirely heritable, and on his death descends to his heir at law. But by the Building Societies Act, 1874, s. 30, as interpreted by s. 6, it was enacted that whenever a member of a society under the Act, having executed a mortgage, conveyance, or bond and disposition in security, to the society, shall die intestate, leaving an infant heir, or infant co-heiress,

[1] *Weir's Exrs.* v. *Durham*, 1870, 8 M. 725.

[2] *Latta* v. *Edin. Eccles. Commrs.*, 1877, 5 R. 266.

[3] *Dow* v. *Imrie*, 1887, 14 R. 928.

it shall be lawful for the society, after selling the property, to pay to the administrator or administratrix (executor-dative) of the deceased member, any money, to the amount of £150, which shall remain in the hands of the society, after paying the amount due to the society and the costs and expenses of the sale. The money is to be considered personal estate (*Danvers*, 28 May 1889).

Right of Reduction :—

I do not think that I ever heard of a right of reduction being confirmed to. On the contrary, the right of raising necessary actions is part of the office of executor. It accrues to the office because the executorship is a general title of administration, and it needs no separate confirmation.[1]

Success in the reduction may open the way to substantial claims, when confirmation will be essential to realisation, but that is another matter.

Trust Funds.—Funds standing in a deceased's name as trustee or executor are not liable in duty, and cannot be confirmed (p. 188). But where the deceased, besides being trustee or executor, had also a beneficial interest in the estate, to the extent of that interest it falls to be included in the inventory and may be confirmed. Where the deceased has intermixed the trust-funds with his own, so that they cannot be distinguished, or invested them in his own name absolutely, they may then be included in the inventory as *ex facie* belonging to him beneficially ; the right of the beneficiaries as a debt due by him, and the duty, are adjusted accordingly.

Locality of Estate.—The general law is that the law of the place where an asset is situated determines whether the asset is heritable or moveable. If it is thus determined to be heritable, the law of the *locus* also determines how it shall descend beneficially ; if moveable, that is decided by the law of the domicile of the deceased. For the immediate purpose of this book the *locus*, and the quality of the estate as decided by the law of the *locus*, are important, for (1) the confirmation can contain only personal estate, and (2) only such estate situated in the United Kingdom ; and (3) apart from the strict question of the inventory, estate duty is *not* payable on heritable (immoveable) estate out of the United Kingdom, even though the deceased was domiciled in the United Kingdom, and *is* payable on moveable estate legally held as having, even temporarily, a local situation in the United Kingdom, even though the deceased was not domiciled in the United Kingdom. It might be supposed that there was no difficulty in knowing the local situation of any asset, but in fact very technical, if not arbitrary, rules are laid down in that respect in the case of incorporeal assets ; the rules appear to some extent not to be the same in Scotland as in England ; and there is, especially in England, a straining to attach to incorporeal rights, such as loans, somewhat of the quality of corporeal rights, by taking the evidence of the right, *e.g.* a mortgage deed, as equivalent to the right itself.

[1] *Johnston's Exr.* v. *Dobie*, 1907 S.C. 31.

Thus in Hanson's *Death Duties* (p. 109) it is laid down "the locality of a mortgage debt is regulated by the same rules that apply to other debts, and in no way depends on the situation of the property comprised therein." This means that, in English law, a mortgage debt due by an American citizen to an Englishman or a Scotsman, secured on English land, is an American asset. Now, suppose that the creditor has died domiciled in Scotland, no question of estate duty arises, for the liability is clear; but no grant of representation is required in England, and it appears to be both unnecessary and incompetent to include the asset in the inventory as English estate, for the law bearing on that question must be English law. Thus, if it is a case of intestacy, so much less caution will be required. If, again, it is a case of resealing a colonial grant in Scotland, it is a statutory requirement (p. 202) that estate duty must be paid in Edinburgh on the whole estate liable to duty in the United Kingdom. Suppose that the deceased, domiciled in, say, Canada, had given two loans to an American, one secured by a mortgage of English land and the other by a bond over Scottish heritage. It is here assumed that the latter is liable to United Kingdom estate duty, but apparently the former is not. There will be agreement that it can make no difference on this point whether the duty is paid in Edinburgh or in London; and the rule is that there shall be one payment only for the whole of the United Kingdom.

Estate in the Channel Islands and the Isle of Man is estate abroad. It may here be noted that the Savings Banks regulations (both Post Office and trustee) provide for payment to representatives of depositors domiciled in those islands without confirmation, and free of United Kingdom duty.

British Government Stocks, etc.—By the Finance Act (No. 2), 1915, s. 48, it is provided—

> Where the holder of any Government stock dies, the production of probate, confirmation, or letters of administration granted by any court in the United Kingdom having authority to grant the same, shall be sufficient authority to the Banks of England and Ireland, to the National Debt Commissioners, to the Postmaster General, and to any savings bank authority, to transfer the stock to the person to whom the probate, confirmation, or letters of administration were granted, or as directed by that person.

Thus resealing for those cases is ended; but as to Ireland see chap. XVII.

British Railway Stocks.—Similar provisions have been made in the eastern and western amalgamation schemes, which include the railways in Scotland. The following are excerpts from the eastern scheme, incorporating the North British Railway and the Great North of Scotland Railway, and though they go beyond confirmation it may prove useful to have them printed here:—

> *Section 30—Receipt in Case of Person not* sui juris.—If any money is at any time payable by the company to a holder of stock or a mortgage of the company being a minor idiot or lunatic, the receipt of the guardian or committee of his estate shall be a sufficient discharge to the company. In this

section the expression " guardian or committee " includes persons comprised in the expression " trustees " as defined by the Trusts (Scotland) Act, 1921.

Section 32—Scottish Stockholders and Scottish Trusts.—(1) Stockholders entitled to stock of the company by virtue of the provisions of this scheme shall be entered in the books of the company in the same terms as immediately before the date of vesting they are entered in the books of the six companies.

(2) For the purpose of s. 19 of the Companies Clauses Consolidation Act, 1845, a confirmation or testament-dative, granted by any court in Scotland having authority to grant the same, shall have the same effect as the probate of a will or letters of administration.

(3) In the case of trusts subject to the law of Scotland, the following provisions shall apply and have effect, that is to say :—

(*a*) Where any stock of the company is held by a trustee as defined in the Trusts (Scotland) Act, 1921, or any Act amending the same, the company shall on the request of such holder, in writing, enter him in the books of the company as trustee in accordance with such request. A transfer to a trustee as such shall be equivalent to such request.

(*b*) Where persons are entered in the books of the company as trustees [1] or as executors-dative, they shall, as regards the transmission of the stock in respect of which they are so entered, be entitled to act by a quorum as provided by the Trusts (Scotland) Act, 1921, or by the trust deed as therein defined, or by the Executors (Scotland) Act, 1900.

(*c*) In the case of the assumption or appointment of a trustee, or of the appointment of a trustee by the court or by any person entitled to do so, or of the resignation of a trustee whether in terms of the Trusts (Scotland) Act, 1921, or of the trust deed as therein defined, the deed of assumption, or deed or minute of appointment, with minute of acceptance by the assumed or appointed trustee, or an official or duly authenticated extract thereof, or a certified copy of the interlocutor of the court making the appointment, or the minute of resignation with acceptance of intimation of resignation by the remaining trustee, or an official or duly authenticated extract thereof as the case may be, shall be accepted by the company as sufficient evidence of the transmission of stock to the assumed or appointed trustee and of the divestiture of the trustee who has resigned. In the event of the removal of a trustee by the court, a certified copy of the interlocutor of the court shall be accepted by the company as sufficient evidence of such removal.

(*d*) Where any transfer of stock or authority for the payment to any person of the interest or dividends on any stock purporting to be executed or signed by a stockholder entered in the books of the company as a trustee in pursuance of this sub-section is produced to the company, the company shall not be concerned to inquire whether the stockholder is entitled under the terms of the trust to execute any such transfer or give any such authority and may act on the transfer or authority in the same manner as though the stockholder had not been so entered, and whether the stockholder is or is not described in the transfer or authority as a trustee, and whether he does or does not purport to execute the transfer or give the authority in his capacity as a trustee.

[1] This includes executors-nominate.

(4) Any order or decree or official extract thereof of any court in Scotland whereby the right to transfer or call for a transfer of any stock of the company, or to receive any dividend thereon, is expressed to be vested in any person shall be sufficient authority to the company to allow the transfer of the stock or to pay the dividends in accordance with the order or decree. An official extract of any such appointment as is mentioned in s. 13 of the Judicial Factors (Scotland) Act, 1889, shall, where any stock of the company is specified in such official extract or in a certificate under seal by the accountant of court produced along with such extract as belonging to or forming part of the estate under the charge of the person named in the extract, be deemed, for the purposes of this section, to be a decree whereby the right to transfer such stock is vested in the person so named.

Exactly similar sections (24 and 32) are contained in the scheme of the London, Midland, and Scottish Railway (incorporating the Glasgow and South-Western and the Highland Railways).

Life Policies. – Most British life offices have powers in their constitutions authorising or requiring them to pay on any United Kingdom grant without resealing, and any offices which may not be in that legal position conform to the same practice; competition compels. As to dominion grants, p. 203, and as to policy-holders domiciled out of the United Kingdom, p. 121.

Companies' Colonial Registers. – Section 34 of the Companies (Consolidation) Act, 1908, authorises certain companies to keep in British dominions a branch register of members *resident* in that dominion, and s. 36 provides that on the death of a member registered in the colonial register his shares shall, but only if he died domiciled in the United Kingdom, be deemed, so far as relates to British duties, to be estate situate in the United Kingdom in respect of which an inventory requires to be recorded. But even so, allowance is made from the United Kingdom duty for any duty paid in the dominion. If the shareholder died domiciled in the dominion or anywhere else outside of the United Kingdom, the shares are not liable to United Kingdom estate duty.

Corporeal moveables, such as cash or bank-notes, jewellery, furniture, stock-in-trade, live-stock, implements of trade and husbandry, and the like, belonging to an individual, are estate where they happen to be at his death. Thus, when a Scotsman dies abroad, the money and effects he had with him do not fall to be included in the inventory and confirmation as Scottish estate.

In regard to other kinds of personal property, there have been a number of decisions in the English courts which appear to be applicable in questions relating to the contents of an inventory. From those decisions the following rules appear to be established: – Debts are assets where the debtor resides at the time of the creditor's death; judgment debts, where the judgment is recorded. Bills of exchange and promissory notes do not

alter the nature of simple contract debts, but are merely evidence of title ; therefore the debts due on these instruments are assets where the debtor lives, and not where the instrument is found. Foreign bills of exchange, however, payable to order, which are well known to be the subject of commerce, and to be usually sold on the exchange, if in this country at the owner's death, are assets here, which are liable in duty even though the deceased was not domiciled here, and they may be included in a confirmation. But debts due from persons resident abroad, and shares or interests in foreign funds payable abroad, and incapable of being completely transferred here, are not estate within the jurisdiction of the courts of this country, and no title to uplift them can be granted by these courts. It has been decided that goods in the hands of the deceased's agents in America, and debts due to the deceased from persons there, French rentes, and American stock, being part of the national debt of France and America, and transferable there only, were not assets locally situated here. But if the certificates of these or other foreign stock are granted to bearer, and are here, they are estate in this country. It has also been decided that Russian, Dutch, and Danish bonds, the dividends on the Dutch bonds being payable in Amsterdam, and those on the other bonds in London, but the bonds themselves being saleable and transferable by delivery, and it being unnecessary for the holder to do any act out of the United Kingdom in order to render the transfer valid, were instruments in the nature of chattels ; and that where instruments of this nature are created —instruments capable of being transferred by acts done here and sold for money here, which any banker or other custodier might refuse to deliver to an executor unless he had made up a title to them—they must be regarded, if locally situated in this country at the death, as assets within the jurisdiction of the courts of this country, and liable to duty even though the deceased's domicile was not in the United Kingdom.

Various Investments.—The following are considered officially to have a local situation in the United Kingdom.

1. Stock of any dominion or state, transferable in books of the Bank of England or elsewhere in the United Kingdom.

2. Stock of a dominion or foreign company transferable *only* on a register kept in the United Kingdom.[1]

3. The like transferable either on a register kept in the United Kingdom or in a register elsewhere, if the documents were in the United Kingdom at the death.[1]

4. Investments which pass by delivery by force either of being "bearer," [2] or of being blank endorsed,[3] and transferable without any act being necessary beyond the United Kingdom.

Money secured on heritage in Scotland is always given up and confirmed as Scottish estate, though the granter of the bond or other debtor may be resident in England or abroad. Where the granter is resident

[1] *M'Kecknie* v. *Clark*, [1904] 1 Ch. 294.
[2] *Winans* v. *Att.-Gen.*, [1910] A.C. 27.
[3] *Stern* v. *Reg.*, [1896] 1 Q.B. 211.

in England, and it is desired to obtain a title against him in respect of the personal obligation in the bond, a separate entry at a nominal value may be made and confirmed under the head of English estate. Any personal estate realisable in Scotland, assigned in security of a debt, may also be given up and confirmed though the debtor is abroad. Where in an original inventory a debt had been mentioned as estate abroad, the debtor being in Norway, on his death while the debt was unpaid, a Scottish policy of insurance on his life, which had been assigned in security of the debt, was given up in an additional inventory and confirmed as Scottish estate (*Street*, 22 December 1886).

By an Act of 1864 it was enacted that probate and inventory duties—

> shall be charged and paid in respect of the value of any ship or any share of a ship belonging to any deceased person which shall be registered at any port in the United Kingdom notwithstanding such ship at the time of the death of the testator or intestate may have been at sea or elsewhere out of the United Kingdom, and for the purpose of charging the said duties, such ship shall be deemed to have been at the time aforesaid in the port at which she may be registered.[1]

This applies to estate duty. It does not follow that the cargo is estate where the ship is registered; but where the bills of lading are in this country, they are held liable in duty irrespective of domicile.[1]

It would appear that in England personal property of any kind, which at the time of the death of the owner is *in transitu* to that country, and property belonging to a British subject on the high seas, were liable to probate duty.[2] In Scotland it was always the practice to hold, in terms of the Act by which inventory duty was imposed, that it was payable only in respect of the value of estate in Scotland.[3] But where estate has been transmitted to this country after the owner's death confirmation may be necessary to obtain possession; and it appears that confirmation is a good title to such estate. Where the deceased died domiciled in England, and certain funds in Scotland at the death had been transmitted to England after the death, and uplifted by the English administrator, it was held that the debtors in Scotland were not liable in second payment to a person who had been confirmed executor-creditor in Scotland.[4] Where a sailor had died at Marseilles, and his effects had been sold and the proceeds transmitted to this country, and placed, along with the wages due by the owners of the ship in Scotland, in the hands of the mercantile marine board at Greenock, the whole were included in the inventory and confirmed (*Taylor*, 19 Mar. 1873); and where the deceased had been an engineer on board a steamship trading from Singapore, and had died at Celebes with no estate in this country at the time, and the whole contents of the inventory confirmed consisted of a sum of money and some personal effects which had been transmitted to the superintendent of the mercantile marine board at Glasgow, the inventory was duly stamped

[1] 27 & 28 Vict. c. 56, s. 4.

[2] Hanson, 111.

[3] 48 Geo. III. c. 149, s. 41.

[4] *Hutchison & Co.* v. *Aberdeen Banking Co.*, 1837, 15 S. 1100.

in the first instance and application afterwards made for return of the duty, which was granted (*Shearer*, 1 June 1883). Funds realised through the administrator-general in India, and transmitted to the India Office in London were held payable on production of a probate or of a confirmation sealed in the probate court, though not included in the sum confirmed.

By an Act of 1860, it was enacted that—

all Indian Government promissory notes and certificates issued or stock created in lieu thereof, being assets of a deceased person, the interest whereon or in respect of which shall be payable in London by drafts payable in India, and which at the decease of the owner thereof shall have been registered in the books of the Secretary of State in Council in London, or in the books of the governor and company of the Bank of England, or shall have been enfaced in India for the purpose of being so registered before the decease of the owner thereof, and all Indian Government promissory notes issued with coupons attached, which, under such regulations and conditions as may be determined from time to time by the Secretary of State in council, shall be so registered, and all certificates issued, or stock created in lieu thereof, shall be deemed and taken to be personal estate and *bona notabilia* of such deceased person in England, and probate or letters of administration in England, or confirmation granted in Scotland and sealed with the seal of the principal court of probate in England, in pursuance of the provisions of the "Confirmation and Probate Act 1858," shall be valid and sufficient to constitute the persons therein named the legal personal representatives of the deceased with respect to such notes and moneys as aforesaid.[1]

Trust Estates.—When the deceased was entitled to a share or interest of or in a trust-fund or estate two things are important: (1) the domicile of the trust, *i.e.* not the residence of the trustees, but the country to whose law and courts the trust and trustees are subject; and (2) whether the deceased's interest was of such a nature as to give him right to any particular asset or investment, or proportion thereof, *in specie*, or whether he had merely a claim to a balance, or a share of a balance, to arise on an accounting with the trustees. The beneficiary's claim may be of the specific nature either by the original conception of the trust or by valid appropriation of assets to answer his claim. If the interest is specific, then the nature and situation of the asset may be very important. Thus, even if the trust and the deceased beneficiary's domicile were both in the United Kingdom, it appears that moveable property out of the United Kingdom would not be the subject of confirmation, and that immoveable property out of the United Kingdom would not be dutiable; and if the beneficiary's domicile were out of the United Kingdom no property out of the United Kingdom would attract duty. If, on the other hand, the deceased beneficiary had no claim to specific assets, the trust being British, confirmation is required and duty is payable, though the assets may be immoveable property out of the United Kingdom.[2] The fact that confirmation of an estate has been taken out in the sheriff court of the deceased's domicile does not of itself subject the executors to the

[1] 23 Vict. c. 5, s. 1.

[2] *Sudeley* v. *Att.-Gen.*, [1897] A.C. 11; *Re Smyth*, [1898] 1 Ch. 89; *Att.-Gen.* v. *Johnson*, [1907] 2 K.B. 885.

jurisdiction of that court.[1] But a trustee under a Scottish trust, though resident in England, has been held subject to the jurisdiction of the court of session.[2] Shares in the Bank of Bengal standing in the name of trustees all resident in this country, and held by them for behoof of the deceased, were given up and confirmed as estate in Scotland (*Cheape*, 25 April 1887), but *quære*, if the deceased had a right specifically to the actual bank shares.

Partnership Interests.—The interest of a deceased partner is held to be estate situated at the place where the business is carried on, or, where the firm conducts business in different countries, then at the place where it has its principal establishment, and that although foreign property and foreign debts may be included in its assets.[3] Apart from special stipulations the legal interest in the partnership property vests in the surviving partner, who is liable to account for and pay to the representatives of the deceased partner the amount which may ultimately appear due to him after the assets have been realised and the partnership debts discharged. This liability is in the nature of a personal debt, and situate, like other debts, where the debtor resides; at least the facts may be such as to produce that legal position.

Very important questions arise in connection with these partnership interests. It is not to be assumed that foreign laws are to the same effect as ours, and it may be that a deceased partner had a direct legal relation to immoveable estate abroad, with the result of escaping United Kingdom estate duty, or the immoveable property, though used for the business, may not have been a partnership asset.

There is also the question of the period of time at which a surviving partner's interest, assuming that he takes over the other's share, changes from moveable to immoveable as regards immoveable assets. Thus suppose he also dies before winding-up, was his right in the immoveable assets "immoveable" in quality from the date of the first deceaser's death?

Bank Deposits.—Though a bank or investment company has branches in several countries, the interest of its proprietors is held to be centred at its head office; but sums deposited with the bank or company are generally held to be estate at the place where the deposit is made and is payable. In the event of liquidation, however, it would appear that a title must be made up in the courts of the country where the head office is. In some cases a deposit made with a British bank at one of its branches abroad has by arrangement been held to be payable in this country and included in an inventory and confirmation.

Stamping the Inventory.—It is often a matter of extreme urgency to have the inventory recorded and confirmation issued so as to give a title

[1] *Halliday's Exr.* v. *Halliday's Exrs.*, 1886, 14 R. 251.

[2] *Kennedy* v. *Kennedy*, 1884, 12 R. 275; *Robertson's Tr.* v. *Nicholson*, 1888, 15 R. 914.

[3] *Lord Advocate* v. *Laidlay's Trs.*, 1890, 17 R. (H.L.) 67.

on which important realisations may be dependent. Before being lodged in the commissary or sheriff clerk's office the inventory must be stamped. The mere physical stamping of course takes no time, but under modern practice it is not stamped across the counter. It has to be left for preliminary official examination, but it is the aim of the inland revenue department to pass on the inventory for stamping without any delay, and to this end the pre-examination is confined to arithmetical correctness and to the pointing out of obvious errors or omissions. That is without prejudice to the proper close scrutiny in due course when the inventory again reaches the department from the commissary or sheriff clerk's office.

CHAPTER IX

VALUATION OF ESTATE [1]

THE earlier rule was that, for purposes of inventory duty, the estate was valued as at the date of the oath to the inventory, including the interest, profits, and proceeds accrued from the date of death. But the modern rule is that the date as at which the valuation—if that is the correct term—is to be made is the date of death, and interest is payable on the duty from that date till the duty is paid.

In many cases where assets have stable values the one rule may work out much about the same as the other. In the one case you added interest to the assets and calculated the duty on both ; in the other case you calculate the duty on the principal value only, and then add interest on the duty. But no matter how stable the value may be, this makes a difference when the rate of interest yielded by the asset is less or more than the rate charged on the duty. That, however, is the least of it, for there are many assets of fluctuating values, and then a change in the date as at which the valuation is made may have most important consequences. Stock exchange securities are the example which comes first to mind ; an interval of a month may witness a great slump or the reverse. Even more illustrative are such cases as reversionary interests depending on lives, and policies of assurance on the lives of others. In those cases the dropping of a life even one day—or less—after the death of the owner may make a vast difference in the valuation or value.

The rule of general application is contained in subsection (5) of s. 7 of the Finance Act, 1894, and is as follows :—

The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners [of Inland Revenue], such property would fetch if sold in the open market at the time of the death of the deceased.

This is the statutory standard, and it requires critical analysis :

1. *Notional Sale.*—The statutory standard postulates a *sale* at the time of the death of the deceased. It matters not that the deceased had no intention of selling, nor that the successor has no intention of selling or perhaps no power to sell, nor that a prudent or sagacious person would not sell, or at any rate would not sell at that time.

[1] In this chapter statutory references, when the Act is not mentioned, are to the Finance Act, 1894.

2. *Nature of Sale.*[1]—In *Clay*, Cozens-Hardy M.R., dealing with land values under section 25 (1) of the Finance (1909-10) Act, 1910, said that you are not necessarily to assume a sale without reserve. But that section appears to be materially different from s. 7 (5). The latter requires you to find the "*price*" which the property "*would* fetch" if sold, while the former section merely speaks of the "*amount*" which the property, if sold, "*might be expected* to realise." In the one case you are invited to assume that the hammer has fallen and to find the result; in the other, to find what result might have been obtained if the hammer had fallen. The difference between a sale with, and one without, reserve is material. It is stated by Scrutton, now Lord Justice, in *Clay* thus, with reference to the words "willing seller" which occur in the 1910 Act but not in the 1894 Act:—

"A willing seller does not mean a person who is willing to sell for any price however inadequate, or who is under compulsion, but one who will not insist on a fancy price."

Now, under the 1894 Act, the correct view may be that the seller is under a statutory notional compulsion.

3. *Time.*—This notional sale is to be "at the time of the death." It appears that it is really the value to the deceased that is to be arrived at.[2] In certain classes of property a day or an hour might make a vast difference either up or down. Sudden appreciation arises in the case of property dependent on lives, and sudden depreciation may be due to a fire loss. The subject appears to be entitled to stand upon his statutory right to take the value at the moment of death.

Then one has to consider the particular time of the year at which the death occurs, and also in relation to that, at what time it is to be assumed that the hypothetical purchaser in the open market would be required to pay the price. Thus, take the deceased's own dwelling-house and assume that he dies in July. That is a very awkward time for sales of residential property, for the selling and removal seasons are past, people are in the midst of the holidays, and loans are not so conveniently obtainable. Section 7 (5) assumes an immediate sale in July, with apparently the like immediate settlement and entry. These are seriously depressing factors, and ought to be allowed for.

4. *Mode.*—The subsection does not say that the notional sale is to be deemed to be by auction, and this is not implied (*Clay, supra*).

If the property would sell better in lots, a sale in that way must be assumed.[3] In the case of anyone dying on or after 30 April 1909, no deduction is to be made for the probability that the price would be depressed by throwing the whole property on the market at one time,[4] but depreciation due to the death of the deceased must be allowed for.[4]

5. *Place.*—Nor does the subsection say anything about the place of

[1] *Inland Revenue* v. *Clay*, [1914] 3 K.B. 466.

[2] *Attorney-General* v. *Jameson*, [1905] 2 Ir. R. 218.

[3] *Ellesmere* v. *Inland Revenue*, [1918] 2 K.B. 735.

[4] Finance Act, 1910, s. 60 (2).

the hypothetical sale. It appears that it need not be the place where the property is situated, and indeed if there were a better market elsewhere, the latter would no doubt need to be assumed; see below under "price" as to additional expense of sale.

6. *Open Market.*—The meaning of this expression is dealt with in the English case of *Clay* (*supra*) and in the Scottish case of *Glass*.[1] It does not necessarily mean auction, but it imports fair conditions, full publicity, and an opportunity to all and sundry, and not to merely a selected class such as a family. Speculative purchasers must be notionally included, and the cases show the extent to which it is to be deemed that their speculative spirit might carry them.

7. *Actual Impossibility.*—But then the circumstances may be such that in point of fact such an unfettered sale is legally impossible. In saying this the reference is not to any fetters which the deceased may himself have created in his will, and indeed it may be taken as clear that the terms of the will are wholly irrelevant. But it is common in the case of private companies to have all manner of restrictions in the company's constitution. This was the Irish case of *Jameson* already cited. The other shareholders had pre-emption rights at a fixed price of £100 per share. The executors claimed that that was the correct value. The Crown claimed that the restrictions must be wholly ignored. The decision lay between these extremes, namely, the fair price which a willing purchaser would give, assuming he could get on to the register in the shoes of the deceased, but then to hold subject to the restrictive conditions. It will be seen that this was really the value *to the deceased*. It was well pointed out that the restrictions cut both ways. They hampered alienation by the testator, which operated for the benefit of the other shareholders, and correspondingly lessened the value of the testator's shares, but the restrictions also hampered alienations by the other shareholders of their holdings, which operated for the benefit of the testator as a shareholder, and correspondingly increased the value of his shares. This is a good example of the case where the free sale which subsection 7 (5) postulates is in fact and in law an impossibility, nevertheless the postulate must have effect by what Lord Ashbourne L.C. called "a feat of imagination." That is to say, you assume (1) that the executors can (contrary to the company's articles) sell to the public in defiance of the pre-emption right, but (2) that what the purchaser will be registered as holder of will be the shares subject to the pre-emption right in terms of the articles.

8. "*Price.*"—This means gross, not net. That is to say, the vendor's sale expenses are not to be deducted. But that is quite a different thing from saying that the purchaser's expense of purchase is to be ignored; on the contrary, that is a relevant consideration in arriving at the figure which a purchaser would give. Further, even as to vendor's expenses, if a sale of foreign property (not necessarily a foreign sale) would be attended with additional expense, there may be an allowance, but only

[1] *Glass* v. *Inland Revenue*, 1915 S.C. 449.

for *extra* expense and only up to 5 per cent. (s. 7 (3)); and much the same rule is applied to cases where a specially expensive place of sale, even at home and of home property, is assumed. As to allowance of certain expenses in partnership cases, see p. 141. And even as to the vendor's expenses no doubt no deduction can be made on that head from the valuation figure, but *it* is arrived at on a judgment of the price which a purchaser would give, and, at least in certain cases, allowance should therefore be made, as any purchaser would make it, for what it would cost him to re-sell or otherwise realise; take, for instance, book debts.

9. *Post-mortem Changes.*—On these various matters it appears not to be relevant to inquire whether, or to prove that, the asset in question has in fact already been got in by the executors at 20s. per £. That is alien to the issue, which is—What price would have been got by sale at the time of the death? Suppose the testator has a claim for £1000 against X., who is clearly insolvent, but immediately after the creditor's death—say next day—some other person dies and leaves X. a legacy which enables him to pay everyone in full. On the words of the Act, it appears clear that it is the insolvent X.'s liability which has to be valued, and that the effect of the legacy is to be disregarded. Or suppose the testator has a large holding of ordinary shares in a company (unquoted), which company is involved in a litigation perilling practically its whole capital and reserves, and that unanimous and clear decisions adverse to the company have been given in the Scottish Courts, and at the death an appeal to the House of Lords is pending, and that appeal is heard and decided in favour of the company in the week following the death. It is not suggested that the valuation as at the time of the death must be on the assumption that the Lords will decide against the company, but neither can it be on the contrary assumption; it will be somewhere between, but with an inclination against the company in view of the adverse Scottish judgments. Of course the evidence of actual dealings might be available.

Other instances of post-mortem changes are a Budget speech delivered the day after death, announcing remission of duty on the asset in question or imposition of duty on some competing article of commerce. Another good instance is when A. dies with a vested reversionary interest in £50,000, expectant on the deaths of three young or middle-aged liferenters, who are all killed next day in battle or in a railway accident; at A.'s death the value might be less than £10,000, while next day it approaches £50,000.

Evidence.—Under s. 8 (5) the executor and agents are bound to deliver to the commissioners "and 'verify' a statement of such particulars, together with such evidence as they require." It is thought that this does not compel delivery of documents, even valuations. Valuations for purposes of death duty are exempt from stamp.

Subject to the standard laid down in s. 7 (5) the value is to be ascertained by the commissioners in such manner and by such means as they think fit. They may and do consult experts, and the owner must allow inspection (s. 7 (8)). If they require a valuation to be made by any person "named by them," they pay for it (s. 7 (9)). Section 7 (8) may entitle

them to refuse to hear evidence, but on principle they may not be entitled to decide without hearing argument *viva voce*; in practice extensive argument proceeds by correspondence, and a vast number of adjustments between conflicting extremes on both sides are arrived at in that way. If a "valuation" is obtained under s. 7 (9), or by the executor at his own hand, the executor will be careful to see that the valuer understands that what is called a "valuation" is really a report on probable sale price on a given date on the conditions of s. 7 (5). It is assumed that the executor is entitled to see a valuation obtained under s. 7 (9).

Appeals.—Beyond the Commissioners the provisions for appeal are in s. 10 of Finance Act, 1894, s. 22 of Finance Act, 1896, and s. 60 of Finance (1909–10) Act, 1910, under which the taxpayer is entitled to the decision of a judicial tribunal or of a judicial referee.

Corporeal Moveables.—These include household furniture, plenishing, plate, pictures, books; cars; stock in trade, machinery, and plant; farm stock, crop, and implements. The value is generally evidenced by the valuation of a licensed appraiser, or by the executor's estimate in very small cases, or by actual sale price.

Pedigree Live-stock.—Reference is made to *Marr's* case.[1] The asset in question was a herd of pedigree cattle. The testator died in June. A neighbouring farmer, skilled in the special industry, valued the herd in lump, fourteen days after the owner's death, at £9031; at an auction, in October following, the animals were sold individually at a total figure of £17,722. The Crown claimed duty on the latter figure, but they were held bound by the valuation. No doubt there were specialties of a striking nature, but the Lord Ordinary usefully said that, even without them, he would have decided against the Crown. The four months June to October work great changes in cattle, and the Crown, even if they had not been bound by the valuation of June, could not have obtained the sale price of October without allowing deductions for housing, keep, skilled management, and interest on capital in the interval. But to put it that way is to miss or confuse the standard prescribed by s. 7 (5), which refers everything to a sale at the time of the death. The truth is that the herd had essentially changed between death and sale. The same position in essence arises in other lines of production. This decision is a forceful illustration of the necessity for a rigid application of the standard. It is thought to prove that that standard is to be applied notwithstanding that on the day of death the position is such that no sensible man would sell, that the executors or successor would certainly be, or are, advised not to sell, and that the folly of a sale at that time is so obvious and notorious that trustees who did act so foolishly would be held liable in damages to the beneficiaries.

Unexhausted Manures.—When a farmer dies during the currency of his farm lease, after having applied to the land artificial manures and

[1] *Inland Revenue* v. *Marr's Trs.*, 1906, 44 S.L.R. 647; 1906, 14 S.L.T. 585.

the manurial value of feeding stuffs, admittedly unexhausted, that does not constitute dutiable " estate." [1]

Book and Other Debts.—Take the case of a personal bond or IOU in favour of the deceased for £1000, granted perhaps by someone resident in some distant foreign country, and of whom little or nothing is known here. That raises the question of the place where the postulated sale in open market is to be assumed to take place. If it may be assumed that the statute intends a notional sale in this country, what price would be likely to be obtained for the debt ? But indeed it does not much matter though it be conceded that it may be necessary to assume a sale in the country of the debtor's residence, for very little may be known about him even there. The executors themselves may have little or no information, but it is of course implied that all the information they do possess shall be made available to intending purchasers. But it appears not permissible to assume delay in order to obtain or verify particulars, for the statute prescribes the time of the notional sale—" the time of the death of the deceased." It is further suggested that these considerations have a material bearing on the proper value to be put on book debts, apart from any specific labelling of them as " bad " or " doubtful." People buy debts in order to make a profit out of them, and therefore, for that reason by itself alone, the statutory test must yield a valuation under par, no matter how good the debts may be. It is no answer to say, " Don't sell at all, but collect," for the sole statutory standard is sale price. But, further, there are the following additional depreciatory elements, namely, (1) the risk of some of the debts turning out unexpectedly disappointing ; (2) expenses of investigation before purchase, of the purchase itself (including stamp duty), and of collection ; (3) interest on price during delay in recovery ; and (4) the prejudice which undoubtedly exists against traffickers in book debts and the material disadvantage which is commonly believed to result from that.

Unexpired Debentures.—Take, for instance, terminable mortgages or debentures of strong corporations or companies, payable say two or three years after the death, and meantime bearing interest equal to, or more or less than, the rate which can be obtained at the time of the death on similar securities. Such assets are very commonly put in at the par or face value. In one sense there is not very much wrong in that, for the parties have no need to sell, and no thought of selling, and they would not dream of accepting less than 20s. per £, which they may in one view be advised that the assets are " worth." But this ignores the statutory test, which is—sale price in the open market at the time of the death. If the interest is lower than it would be on a new investment, then manifestly the asset cannot command par. But the same holds even though the two rates are the same, for which there are several reasons, *e.g.* safety and expense. A new investor is safer with a new bond direct from the

[1] *Lord Advocate* v. *Reid's Trs.*, 1921, 2 S.L.T. 38.

corporation or company, and in that case the borrower pays the expense, whereas on purchasing an existing bond in the market the investor has to meet certain expenses, against which he indemnifies himself by reduced price; besides, many people will not trouble to look out for such casual transfers, and those who do expect bargains.

Heritable Securities.—The same thing applies to heritable securities, but in a greater degree. Here we are referring not to cases where the margin is questionable, or where there are the restrictive specialties of the Rent Restriction Act, though these are *a fortiori*. But let the security be never so good, it is a troublesome and expensive thing to buy a heritable security "in the open market." It is far from clear that the vendor has any power to compel the debtor to open his premises to inspection; indeed, it may be said that the contrary is clear (cf. s. 7 (8)). Besides, not many people are prepared to take all the trouble, and go to the expense, of having the property and the title examined on the mere possibility of a purchase of the bond when they can get new bonds without those complications. Therefore not even the best bond will sell at par. It may be different if the vendor undertakes to pay all expenses, but that is a discount in another form. This applies with added force when there is a time-bargain, but it holds even when that element is not present.

In the case of heritable securities there is apt to be a fallacy under the words "well secured." It is quite true that a bond for £2000 on a property which is worth £2200 is probably safe in the sense that, on a sale, principal and interest may be recovered in full, if arrears have not arisen and if realisation is not specially expensive. But such a bond is very badly secured from the point of view of an investing trustee, and that must powerfully affect the assumed sale price under the statutory standard.

Stock Exchange Securities are, in the general case, taken at a price which represents the lower of the closing prices on the day of death plus one-fourth of the difference between it and the higher price; thus if the closing prices are $89\frac{3}{4}$–$90\frac{3}{4}$, the value may be entered at 90. But there are exceptional cases in which within one day's exchange operations there are wide fluctuations, and it may be necessary to have regard to the actual state of the market at the moment of death. Whether anything more requires to be added depends upon what would, according to the exchange rules, be the position between seller and purchaser under a sale on the day of death. Where a purchaser would have to pay accrued interest that must be brought in, and where a sale would be impliedly ex div. the proportion of dividend to date of death must be added on. But the actual transactions recorded may have been exceptional, and may not form a guide.

It has already been stated (p. 135) that no deduction is to be made for the fact that the deceased held a very large amount of any stock, and that if it were all thrown on the market at one and the same time the price would sag, as it often does for that very reason. This is an exception to the statutory standard under s. 7 (5), and accentuates the rule.

When Victory Bonds are tendered at par in payment of estate duty, they are of course valued in the inventory at market price, but if legacy duty is payable on, say, a residue account, the department maintain that the deduction in that account for estate duty paid should not exceed the figure at which the bonds are brought in ; but *quære.*

Unquoted Securities.—In the case of unquoted securities the secretary of the company may be able to supply equivalent information as to dealings. If that fails, or is unsatisfactory, an opinion can be obtained from a member of the stock exchange.

As to shares subject to restrictive conditions of transfer, see *Jameson* (p. 136), and as to minus values, see p. 150.

Partnership Interests.—It is understood that the department admit here what is practically an exception to the rule that expenses of realisation are not a deduction from value. The deceased's share is taken at his proper proportion of all the partnership assets *after* they have all been realised. This, it is understood, allows deduction from gross figures for cost of realisation by surviving partners or partner or a judicial factor, the remuneration of a judicial factor, and certain costs of litigation in court proceedings, *e.g.* a petition for a judicial factor.

So far as to the deceased's share, but the problem under s. 7 (5) is different, viz. that being the share as ultimately ascertained, what was the sale value of the share on the day of his death if it had then been brought to the hammer ? This may present an extreme instance of the impossibility specially referred to on p. 136, for the surviving partners or partner may have a right of pre-emption. Even so, however, the right to receive the price payable by them was a saleable asset (Partnership Act, 1890, s. 31) on the day of the death, though the amount was of course not then known, and a purchaser might have had to face many contingencies. The position is so far simplified if the contract of co-partnery bases settlement on the last signed balance-sheet.

But it often happens that the circumstances are much more complicated. Take the case of an industrial concern, carried on by father and son, where by the contract of co-partnery the son is entitled to retain the father's capital in the business for as long or as short a time as he pleases after the father's death, and is bound to pay interest on it. The executors have no control ; everything is confided to the son's honesty and sagacity ; at best the capital is exposed to the risks of an industrial business ; the executors neither hold, nor are entitled to require, any security ; their claim is no better than that of any other creditor present or future, and it may easily become worse, for the son may create charges in favour of other creditors ; this is to go on for an indefinite period. Is it safe to assume that in the open market anyone would give 20s. per £ for the capital ? or would buy except with a very substantial discount ?

What the deceased may have prescribed in his will is not the test. Thus he may have said that his son is to have the option of acquiring his business premises, stock, and goodwill at a fixed sum, but

the value for death duty may be either more or less than the sum so fixed.[1]

Shares of Profits.—It often happens that there is payable to a deceased partner's estate or to his widow a certain share of profits of the continuing business for so many years after his death. Such interests may, or may not, be assets of the deceased's estate available for payment of his debts. But however that may be, it is understood that it is common to settle the duty on these interests by waiting to see what amount comes in year by year and then paying estate duty yearly on those ascertained results, which, of course, may increase the rate of duty on the whole estate, for they are certainly not "interests in expectancy." This may have some practical convenience, but it will usually be found that it will pay better to adhere to the standard of s. 7 (5).

Consideration will show that this case of a right to a share of profits for a period of years opens up a most complicated and interesting problem. The factors are numerous; and they present themselves in different combinations in different cases. The surviving partner is probably not bound to carry on the business, and thus the payments would cease on his *bona fide* retirement. They would, in any case, cease on his death or incapacity. If it is a continuing partnership, the payments would cease on dissolution of partnership by the survivors,[2] from which it may be a sequitur that they would cease on two surviving partners assuming a third partner, and on a sole surviving partner entering into a new partnership or turning the business into a limited company. If the payments are to be made to a widow, they would probably cease on her death, though occurring within the five years or other limited period. The start of the calculations for the future may reasonably be from the average of the experience of the past, say five years back, if the payments are intended to stretch five years forward, but any results which are unknown at the death cannot be brought into the calculation, for, being unknown, they could not have been relied on by any intending purchaser at an actual sale. Allowances will naturally be made for falling off in profits owing to the withdrawal of the personal influence of the deceased, and for increased expenses owing to the necessity of introducing additional assistance to supply his place. Interest on capital is another deduction from profits for this purpose. Having got a net figure of assumed profits for the future, say five years, the next thing is to have regard to the fact that it would very likely be six or seven years before all that could be got in for distribution. Then each year's anticipated yield has to be divided into principal and interest, and it seems reasonable to assume that any speculator who would purchase such an asset would expect a high rate of interest on a compound basis and with half-yearly rests. Then the calculation next has regard to the income-tax factor, for it will be noticed that the purchaser would be liable to be taxed on all he draws from his purchase, and all as

[1] *Lord Advocate* v. *Wood's Trs.*, 1910, 1 S.L.T. 186.

[2] *Menzies' Trs.* v. *Black's Trs.*, 1909 S.C. 239.

investment income, though the fact is that to him a large part of it is truly not income at all, but the return of his own capital. Naturally, therefore, against this he provides indemnity by throwing it on the vendor in the form of reduced price. This gives a capital sum, namely, the total of the amounts of principal in each year's collection, less the allowance for income tax thereon. But from this there must be deducted the single lump premiums which a good insurance company would charge to cover, for adequate sums according to the circumstances, the death and incapacity risks in the case of the surviving partner and the death risk in the case of the widow, keeping in view that the former is not bound to submit to medical examination or to give any information on that aspect of the business, and that even with the fullest facilities it may not be possible to cover the incapacity risk. The balance, less an allowance for the purchaser's expenses, will approximate to the price quotation desiderated under s. 7 (5).

Goodwill.—The goodwill of a trading business is an asset of the deceased, and will be valued at the price obtained for it, or which might be obtained for it, in the open market.[1] But where the stock in trade and moveable plant and machinery in connection with a pottery belonging to a deceased had been sold along with the pottery itself as a going concern, it was held that, apart from the enhanced price which the subjects, both heritable and moveable, brought in consequence of being sold in this way, there was no separate value attributable to the goodwill of the business.[2] Where a medical practitioner by his will directed his executor to sell his practice for the benefit of his widow and universal legatory, and it was sold accordingly, but the price received was not included in the inventory and confirmation, it was decided, in a question with a creditor of the deceased, that the sum was not estate available for the deceased's debts.[3]

Life Policies.—1. *On Deceased's own Life.* It is suggested for consideration whether it is quite certain that a policy on the deceased's own life falls to be entered at its face value. There may be two questions: (1) the exact meaning of " at the time of the death " in subsection (5) of s. 7 of the Finance Act, 1894, and (2) even assuming that that means that allowance is to be made for the death itself, what about a sale in the open market ? No investor and not many speculators would go to the trouble and expense of a purchase at the face value, the only results of which would be that they must lose their expenses, including at least one-half of the heavy stamp duty, their agent's charges for realising the policy, and interest while a title was being obtained and possibly longer, not to speak of the possibility of questions regarding admission of age and other matters. The very fact of the executors adopting such an unheard-of course as exposing for sale matured policies, instead of realising in the ordinary way, would be apt to excite suspicion and deter purchasers.

[1] *Donald* v. *Hodgart's Trs.*, 1893, 21 R. 246.

[2] *Bell's Trs.* v. *Bell*, 1884, 12 R. 85.

[3] *Bain* v. *Munro*, 1878, 5 R. 416.

Even apart from these views policies are not payable sooner than on proof of death and title. Assume £12,000 assurance and payment postponed in this necessary way for even one month, which is exceptionally expeditious. That is equal to the postponement of £1000 for one year, which at 5 per cent. represents a deduction of £50.

2. *On Lives of Others.*—It is understood that a policy of assurance held by the deceased on the life of some other person is deemed not to be an interest in expectancy, and therefore not to fall under s. 7 (6), so as to give the executor an option regarding payment of duty. The circumstances may be such that the policy has no surrender value. If it has a surrender value, the sale value may be the same, or more, or the policy may be unsaleable, which it is when the surrender value is more than the sale value, and that is a common enough case. A certificate of sale value can be obtained from an actuary who is accustomed to the business of buying life policies. Even if the life assured died immediately after the holder of the policy, that would make no difference ; the statutory standard would still apply under the 1894 Act, s. 7 (5) just as though the life assured were still surviving. And it is submitted that little, if any, attention is to be paid to evidence of the state of health of the life assured, for that is not an element which is in fact taken into account by companies which do this kind of business.

Reversionary Interests.—These are what are called " interests in expectancy " in s. 7 (6). By the definition clause that expression includes :

> An estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases.

Options.—The executor has by s. 7 (6) an option as to the mode of valuing reversionary interests. He may pay the estate duty either (1) on the death of the deceased, " with the duty in respect of the rest of the estate," or (2) on the expiry of the liferent " when the interest falls into possession."

Option No. 1.—If the duty is paid at the death of the deceased, the interest is valued as at his death like any other asset.

Option No. 2.—If payment of duty is postponed till the fund falls in, then —

(*a*) To fix finally the rate of duty on the *rest* of the estate, the value of the reversionary interest is taken as at the date of the deceased's death. That is of course its sale value.

(*b*) To fix the rate of duty on the reversionary interest when it falls in, you add its then value to the value of the rest of the estate as previously ascertained. The words are, " its value when it falls into possession." It is submitted that what is referred to is the sale value, or (adapting s. 7 (5)) " the price which, in the opinion of the commissioners, the interest would fetch if sold in the open market at the time of the death of the liferenter or other event which makes the interest vest in possession."

The alternative would be the amount which the interest may actually yield, which may be quite a different figure, for realisation sometimes takes years, and many changes may occur in stock exchange values and otherwise. But of course the value is of an interest in possession, *i.e.* allowing for the death of the liferenter or other event.

It is important to state the other effects of postponing payment of the duty:—

1. The executor includes the reversionary interest in the inventory at its reversionary sale value as at the death.

2. The reversionary interest is included, at that value, in the sum for which caution when required, has to be found, unless restricted.

3. The proper proportion of duty is deducted in the "summary of accounts."

4. The reversionary interest is included in the confirmation, and the executor thus at once obtains a complete title to it.

5. The unpaid estate duty is not a charge on the reversionary interest. So the executor can give a good title or a good discharge before paying the duty, and the purchaser or the trustees of the fund have no concern with the payment or non-payment of the duty. It matters not what notice they have, for the case does not fall under s. 8 (18).

The payment of estate duty may be postponed, and confirmation obtained in the meantime, though the reversionary interest is the only asset (*Low*, 21 April 1903).

Exercise of the Option.—It may become extremely important to know whether the option has been exercised, and when it is too late.

Case 1.—A fund of £30,000 is liferented by A., aged thirty, with power to create a successive liferent in favour of any husband who may survive her; subject thereto, it is vested in B., the deceased. The existence of the interest is known to the executor. He includes in the inventory the reversionary value, which may be about £3000, and pays duty on the whole estate including that value. Immediately after the recording of the inventory A. dies a spinster, or a widow, or at least without creating a liferent in favour of her husband. No more duty is payable; the option was exercised. Even if A.'s death occurred before the recording of the inventory, if after B.'s death, the result is the same, though it is then hardly correct to say that it turns on the option.

Case 2.—In the same case the executor brings in the reversionary value only for the purpose of fixing the rate of duty on the other estate, but he pays no duty on the reversionary interest. Before the fund falls in the executor, on second thoughts, desires to pay on the reversionary value. It is too late to exercise a right of option, but an application for commutation may be entertained. The two things may not be the same even apart from the difference of date of valuation.

Case 3.—The change of mind on the executor's part is not until the fund has fallen in. It is too late. The exercise of option is irrevocable, and now that the fund is in possession there is no room for commutation.

Case 4.—If the executor did not know of the existence of the reversionary interest there could be no exercise of option, and even after the fund falls in (if there was no earlier knowledge) he may be in time to pay upon the reversionary value as at the death of the deceased.

Case 5.—Assume an asset which is not an " interest in expectancy " ; say it is such a right to share in future profits as is mentioned on p. 142. In fact an arrangement has been made for paying by instalments on results. As the case does not fall under s. 7 (6), and in view of the absolute terms of s. 7 (5), the executor or beneficiary may be entitled to resile, and to pay on the capital value as at the death, *plus* interest, but less any instalment payments which have meantime been made.

Vested (or Absolute) Reversions.—In no case is it correct to reach the value or assumed price of even an absolutely vested reversionary interest by taking the present values of the assets held by the trustees, or as the case may be, and then merely deducting from that the value of the liferent according to the table annexed to the Succession Duty Act or otherwise. Apart from the question of the proper mode of valuing the liferent, this method is fundamentally wrong. It proceeds on the assumption that, if there is a trust fund of, say, £10,000, liferented by A., and, subject to that liferent, absolutely vested in B., and if A.'s liferent and B.'s fee are separately sold in the open market on the same date, the aggregate of the two prices will be £10,000, which is very far from being the case. It may be that the liferent would sell for £4000. If so it is certain that the fee would not sell for £6000. But the value of the liferent is really irrelevant ; the valuation of the reversionary interest is an entirely independent calculation, and it proceeds irrespective of the state of health of the liferenter, which is never considered in such transactions. It will be remembered that there is no power to compel him to submit to medical examination, or to give any information.

Allowances may have to be made for, *inter alia*, (1) doubt on the legal question of vesting ; if the deceased was the reversioner that may be almost fatal ; if someone else is the reversioner (the deceased being a derivative owner) it may require to be assumed that a purchaser would require the protection of life assurance as for a contingent reversion, in order to make himself safe, which greatly reduces the value ; (2) future births ; (3) the personnel of the trusteeship, including the fact that a sole trusteeship is always a depreciatory factor ; no doubt this might be remedied under pressure, but the sole element is how the fact stood at the date of death ; (4) doubtful assets ; (5) fluctuations in stocks and other values over possibly a long future period ; (6) expenses of administration and winding up, with such contingencies as the trust fund being involved in litigation and the expense of a judicial factory ; (7) also an action of multiplepoinding or other judicial proceedings to enable distribution to be made ; the trustees' expenses would clearly be a relevant deduction, for the beneficiary's share is not ascertained till these are paid, (cf. the analogy of a partnership share, p. 141), and the same applies to

beneficiaries' or claimants' expenses if judicially awarded out of the fund; and (8) death duties.

Still it is the fact that, under certain conditions, and at certain ages, a lower value for the reversionary interest may be brought out by deducting from the fund the value of the liferent as an annuity in terms of the Succession Duty Act table.

Contingent Reversions.—In the sense in which this expression is commonly used in Scotland, it means a reversionary interest affected by some condition or contingency personal to the reversioner, *e.g.* that he shall survive the liferenter, or attain majority, or marry. In this meaning of the term it can never be necessary to value a contingent reversion for death duty in any case in which the deceased was the original reversioner, for either he had fulfilled the condition or he had not. If he had, the reversion thereby became vested; if not, it finally lapsed. But even in this meaning of "contingent," the deceased may have acquired by purchase or otherwise a contingent reversion where some other person still living is the original reversioner, and where the condition is still pending unfulfilled at the deceased's death. Further, in England "contingent" is used to mean what in Scotland is described as "vested subject to defeasance," and this may describe an interest in which the deceased was the original reversioner. For instance, he may have had a vested right subject to defeasance if the liferenter has (or leaves) issue. This is a contingency not personal to the reversioner (the deceased), and may be pending unpurified at his death.

The new element in valuing a contingent, as distinguished from a vested, reversionary interest, is the amount of the single premium required to provide insurance to cover the contingency, and there is the prior question whether insurance is possible. One of the data or postulates is that, without such insurance, business is not possible and there can be no sale; and therefore no value. If the deceased had acquired by purchase there is almost certain to be a policy of insurance in force. If not it may be impossible to insure, for the reversioner may be uninsurable, or he may refuse facilities, or his age may be such in relation to that of the liferenter that the premium is prohibitory. If, again, the deceased was entitled subject to failure of issue of the liferenter, the facts may be such that the premium is nominal or is prohibitory.

Insurances.—With reference to all cases where insurance is required to perfect the title, and where, therefore, the cost of insurance must be allowed for in the notional sale value, the following may be noted:—

1. The insurance must be for the same amount, not as the value or price, but as the fund. The idea is that the hypothetical purchaser would receive the fund if the contingency were purified, or the insurance money if not; therefore they should be equal.

2. Single premium. The amount is deducted from what would be the value of the interest if it were vested.

3. Take the case where the deceased had purchased a contingent

reversion, still contingent at his death, and held also a satisfactory survivorship policy covering the contingency, are there here two assets to be valued separately, or only one asset? Note that the reversionary interest is within s. 7 (6), and that the executor has an option to postpone payment of duty; whereas the policy apparently is not. If the two are to be valued separately, neither has any substantial value. The unprotected reversion would be practically unsaleable. A survivorship policy by itself is worth really nothing, and no survivorship policy has any surrender value.

Value Nil (see p. 150).—Cases occur in which a reversionary interest may ultimately yield a large sum to the deceased's estate, and yet under the rule of s. 7 (5) the value at the death of the deceased is *nil*, and this is final, and no estate duty is then, or ever, payable on it as passing on his death.

This can arise only if there is some contingency affecting the title.

Illustration 1.—The title of A., the deceased, to a fund of £3000, will be defeated if B., the liferenter, has issue. If that condition did not exist the value would be £1000. The single premium to insure for £3000 against the risk is £1100. A.'s reversionary interest has no sale value. It matters not that B. dies the day after A., and without issue.

Illustration 2.—A fund is settled for A. for life, and for her children in fee in such shares as she may appoint. There are three children, B., C., and D., and possibly there may be more. It is not known that any appointment has been made. B. dies with a vested right to one-third of the fund, subject to (1) A.'s liferent; (2) the risk of diminution of his share by future births; and (3) the risk of total extinction by an adverse exercise of A.'s power of appointment. This last risk is not insurable. The share has no sale value.[1]

It is obvious that in such cases, and also in cases where very small values are entered for interests which may afterwards bring in larger sums, after-questions are very apt to arise.[2] This suggests precautions and reference may be made to s. 8 (8), which authorises the commissioners to issue a certificate "of the valuation accepted by them for any class or description of property forming part of such estate." This is made use of in such cases as reversionary interests.

Liferents and Annuities.—This refers to cases where A., deceased, has purchased or succeeded to the liferent right of B. in a fund, or an annuity for B.'s lifetime; and there are other cases the same in essence. These are not interests in expectancy, unless indeed the commencement of the right is postponed. Dismissing that special case, the value is to be ascertained, not according to the tables annexed to the Succession Duty Act, but by a certificate from an actuary accustomed to actual transactions of sale and purchase of such rights. The question is—What would the asset have sold for in the market on the day of the deceased's death?

[1] Finance Acts, by Webster-Brown, 4th ed., 163.

[2] *Lord Advocate* v. *Pringle*, 1878, 5 R. 912.

The certificate will be based on a view of the whole facts, including (1) the age of the life on which the interest depends; (2) divorce risk; (3) risk of fall in income; (4) the security for the payments, and especially, in the case of a trust annuity, whether capital also is liable; (5) trust expenses which, in the case of a liferent, may be a serious factor; (6) income tax; (7) whether paid in advance; (8) the means of tracing the life and producing evidence of survivance at each term. Finally there is the very important matter of life assurance. If a policy is in force, is it fully paid or have premiums to be allowed for? and are the liferent (or annuity) and the policy one asset or two (p. 148)? If there is no policy in force it must be assumed that a purchaser would require to know that it could be effected and would deduct the cost from the price. Without assurance a purchase would be a gamble.

Heritable Property.—The statutory standard of s. 7 (5) applies with some qualifications:—

1. In the case of deaths before 30 April 1909 agricultural property, where no part of the value is due to the expectation of an increased income: the value is not to exceed twenty-five times the annual value under schedule A for income tax, after making (1) such deductions as have not been allowed for income tax and are allowed for succession duty; and (2) a deduction for management not exceeding 5 per cent. of the annual value under schedule A.

2. In the case of deaths on or after 30 April 1909, the preceding paragraph applies only (1) where the deceased's interest was a tenancy from year to year (valueless in Scotland); (2) for fixing gross and net amounts for small estates; and (3) in favour of prior mortgagees and purchasers.

3. Assume sale in lots if more beneficial.

4. No reduction on the theory that the market would be affected by a sale of the whole, whether in lots or otherwise, at one time.

5. *Pro Indiviso Shares.*—It is recognised that this is an unpopular form of possession, and allowance must be made accordingly. It is thought that there is legal ground for a more liberal allowance in Scotland than in England. Any property agent, auctioneer, or valuator, will say that, if the whole property would be worth £10,000, a one-tenth *pro indiviso* share is not worth £1000, and that in most cases a reduction to £900 (10 per cent. off) would not be sufficient. The objections are numerous and serious: (1) divided control; (2) arrested development; (3) liability to the expense of an action of division and sale; (4) practical impossibility of borrowing facilities; no one will lend on *pro indiviso* shares, the main reason for which is the lack of purchasers if it should become necessary to realise under the power of sale, which is exactly the present *de quo*.

6. *Cottages* occupied solely for agricultural purposes are not to be valued with reference to any higher rental which might be obtained by letting to another class of tenants.[1]

[1] Finance Act, 1911, s. 18.

7. " *Tied* " *Liquor Premises.*—The proper way of valuing these was fully discussed in English cases noted below.[1]

8. *Growing Timber.*—See s. 9 of Finance Act, 1912. The timber is excluded from aggregation, and does not affect the rate of duty. Whatever is the rate payable on the rest of the estate, that same rate is payable on proceeds of timber (except underwood) when received, after deducting necessary outgoings, which include replanting to the extent of replacement. This goes on till the timber again " passes." But if the timber is sold growing, either with or apart from the land, duty is then due on the value of the timber as at the death and at the rate applicable to the rest of the estate, deducting what has been paid.

Foreign Estate.—1. As to deduction for additional expense, see p. 136. This includes British dominions.

2. Foreign death duty is a deduction in valuing the asset (s. 7 (4)). This does not relate to assets in British dominions to which s. 20 has been applied ; these are more favourably treated, the dominion duty being allowed off the British duty.

3. As to the set-off of local debts, see p. 154.

4. Conversion of foreign currency according to exchange of the day of death.

Incumbered Assets.—In one sense it does not matter whether, say, a policy of assurance, on which a loan has been obtained from the insurance company, is entered in the inventory at the full valuation, and the loan then included in the schedule of debts, or the loan shown and deducted in the inventory so that only the balance or surplus is included in the inventory summation. But when caution is required it makes the difference that the second method lessens the amount for which caution must be found. If there is a real right of set-off the latter method is allowed

Illustrations.—1. A life policy charged to the company of issue ; or perhaps to any other lender, if intimated.

2. Bank stock transferred to the bank in security.

3. A share of a trust estate on account of which share advances have been obtained by the deceased (*Rose*, 12 Dec. 1889).

4. Where the deceased had sold heritage, but had not received the price, and there is a bond on the heritage : all that the executor can get is the difference between price and debt (*Thomson*, 18 April 1883).

5. It would appear that the principle applies though the counterclaim does not arise from a bond or similar document, and will hold in such cases as counter-debts between the deceased and another person, and a lien of a bank or other company, if existing under its constitution, for debts due to the bank or other company by the stock- or shareholder.

6. The rule has been allowed to operate in the case of a mortgaged share of a ship.

Minus Value.—The best example of property which is, not an asset,

[1] *Ashby's Cobham Brewery Co. Ltd.*, [1906] 2 K.B. 754.

but a liability, is shares in a company with a liability for uncalled capital, or with unlimited liability, as in the case of some companies and practically all partnerships. As always, the test is the position at the time of the deceased's death. Liability is not debt, and even though there is a heavy uncalled liability, and though it may afterwards have to be met by the estate, still it may be the fact that at the death the shares had a value. This was exemplified in the case noted,[1] which related to a holding in the City of Glasgow Bank. The deceased died in March 1878, when, according to the stock exchange quotation, the shares could have been sold for £5738. The bank went into liquidation in October; the executors still held; and the calls exceeded £19,000. No return of duty could be obtained on the £5738, at which the shares had been valued in the inventory, but the calls were treated as debts. This shows that the price obtainable rules, even though, if all the facts had been known, there would have been no sales, no price, no value, and no duty. This is an important principle or application of principle, and may be powerfully used where the position is the other way about, namely, the price unduly depressed on the date of death owing to defective or wrong information; nevertheless *Galletly's* case shows that the price is the test.

When there is a minus value, what it really means is that the minus is the valuation of the measure of the liability as a debt, and accordingly it will be included in the schedule of debts. Assuming that that was a fair assessment at the date of death, it will not be affected though the estate should ultimately escape for less, or for *nil*, or though the minus should become plus. On the other hand, if the executor holds and has to pay calls in excess of the minus item entered as a debt, it would appear that there would be a right to have the additional deduction allowed as being an actual debt paid, but there might be complications which cannot be pursued here.

Postponed Valuations.—Claims and other assets which are disputed or otherwise uncertain, or of uncertain value, may be entered in the inventory, and be thus carried into the confirmation, without having any value attached to them in the meantime; their value, if any, after it has been ascertained, being included in a corrective inventory and thus confirmed. This may amount to an agreement to waive the standard laid down in s. 7 (5) of the 1894 Act, if that is competent.

Amount or Value.—But with reference to what has gone before, attention must be directed to a confusion which is apt to arise between the gross or full amount of an asset and its fair sale value at the death of the deceased. The statutory standard of value under the 1894 Act, s. 7 (5), has a vital bearing on this matter, and it may seriously affect decisions given before its date. Most certainly it cannot now be law that, to enable an executor to give a good discharge, there must in every case be produced a confirmation with inventory attached showing that the asset has

[1] *Galletly's Trs.* v. *Lord Advocate*, 1880, 8 R. 74.

been valued and confirmed at its full face amount. Reversionary interests and policies on the lives of other people are obvious instances to the contrary. Another good example to the contrary are terminable debenture stocks and notes which are quoted on the exchange at a discount; it is clear beyond all possible doubt or question that an executor who confirms £100 of such stock or notes at the exchange quotation of £90 (or £900 for £1000 holding) has a complete title to sell and discharge, and also that his confirmation excludes the possibility of any later grant to an alleged unconfirmed £10 or £100. Again, take a liferent interest or annuity depending on the value of some other life, and fairly valued and confirmed at, say, £1000; neither the trustees or other payers, nor anyone else, could be heard to say that, after the executor has uplifted payments to the amount of £1000, his title is exhausted, and that an eik is required to enable him to make further collections, assuming that the asset is still running.

On this important practical matter it is very pertinent to quote the old case of *Brown* v. *Millar*.[1] The head note is—

> An executor who has stated a debt at its full amount, but valued it at less, and paid stamp on the lower amount, is entitled to sue for, and on obtaining decree, to charge for, the entire sum.

This was an Inner House judgment, affirming Lord Deas, after consultation with, practically a remit to, the inland revenue department. The reference was in the following terms:—

> A party confirms as executrix, having book debts, one of which, stated to be £38 in the inventory, is said to be a debt of which only £9 could be recovered. She gets decree for the whole sum of £38 in absence, and charges. Then, in a suspension, the debtor says: "You have no title, for the stamp not being sufficient, there is no title." The answer is: "The practice is to give up what is believed to be the amount that can be recovered, and then, when more is recovered, to give up an additional inventory and pay the additional stamp duty." Is not that the practice and the ordinary course of business? Answer by secretary of board of inland revenue—It is so.

This is a very important decision. It will be observed that it goes far beyond the idea of a warrant to sue, subject to completing the confirmation before decree or before extract. There must have been extract before there could have been a charge.—Observe further (1) the gross or nominal amount of the asset was stated in the confirmation; (2) the true distinction was taken between amount and value; (3) the valuation was in accordance with genuine belief: (4) the point in the case was precisely that which we are considering, namely, technical title on the confirmation of the stated £38 debt at its fair death value of £9, and that was sustained as a complete title to recover and discharge the full £38; for (5) all that was further required was payment of additional duty on an

[1] 1853, 16 D. 225.

additional inventory, and that only "when (*i.e.* after) more was recovered," and even so nothing was said about an additional confirmation.

All this holds as well under our present system, with this further fiscal arrangement—which is really alien to confirmation and title—that the statutory standard of valuation under 1894 Finance Act, s. 7 (5), excludes any further impost.

It is right to mention also the case of *Smith's Trs.* v. *Grant*,[1] which might appear to indicate something contrary. But it is deprived of all value for the present purpose by the facts (1) that no attempt at valuation had been made, and (2) that it was a case of successive and competing diligences in the form of confirmations as executors-creditors. The opinions make it clear that this latter point was the crux of the case.

It has been suggested that the principle applied in *Brown* v. *Millar* is doubtful because "it enables an executor-dative to uplift the whole of a debt undervalued without finding caution for the surplus."[2] This was always very weak and has now no basis at all. (1) The amount of caution is irrelevant to title; if the title were bad, no amount of caution would make it good; and in any case it has no application to executors-nominate, and had none when Mr Alexander wrote. (2) The word "undervalued" begs the whole question; by parity of reasoning, £1 shares, selling at 10s. at the death and valued at 10s., are "undervalued" if sold later at £1, which is absurd; (3) even if more duty may in some cases be payable, the 1894 Act (s. 7 (6) p. 144) frankly recognises that confirmation may be obtained on credit.

For these reasons the view is submitted that no conflict arises between availing oneself to the full of the benefit of the statutory standard under s. 7 (5), on the one hand, and the necessity of producing a valid title on the other hand. But it may be desirable in some cases to be careful as to the form of the entry. Take for instance an unquoted debenture; the entry might run somewhat as follows:—

Debenture bond for £1000 of the X. Co. Ltd., in favour of the said A. B., numbered and dated , payable on , and bearing interest at 4 per cent. per annum £1000
Interest thereon to date of death 15

£1015

The purpose is to complete title to the whole debt and interest, and same are here entered at the sale figure, as on the date of death of the deceased, put thereon by C. D., stockbroker, Edinburgh, in his report, dated , made on the basis of subsection (5) of s. 7 of the Finance Act, 1894 . £900.

Special questions of valuation arise under the Intestate Husband's Estate Acts (chap. vi.).

Victory Bonds, when tendered for duty, see p. 141.

[1] 1862, 24 D. 1142.

[2] Alexander, Practice of the Commissary Courts, 53.

CHAPTER X

DEBTS AND FUNERAL EXPENSES

The deduction of debts and funeral expenses is regulated by s. 7 (1) and (2) of the 1894 Act.

I. Debts

There is a general right of deduction of debts and incumbrances, but this is subject to the following exceptions or qualifications :—

1. So far as incurred or created by the deceased, there is no right of deduction " unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth, wholly for the deceased's own use and benefit, and to take effect out of his interest."

2. There can be no deduction for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained.

3. Debts or incumbrances incurred or created for the purpose or in consideration of the purchase or extinction of any interest in expectancy in any property passing or deemed to pass on death, and the person whose expectancy is so purchased or extinguished, becomes entitled from or through the deceased (including intestacy) to any interest in that property ; the debt or incumbrance is not deductible (with subqualifications).[1]

4. *Creditors Abroad.*—This relates to debts due to persons resident out of the United Kingdom The rules are :—

(1) If contracted to be paid in the United Kingdom, they are not distinguished in any way from home debts.

(2) The like if they are charged on property in the United Kingdom.

(3) Otherwise they cannot be deducted " in the first instance," *i.e.* in the schedule annexed to the inventory, except to the extent of the value of any personal property of the deceased out of the United Kingdom on which estate duty is paid. If the deceased was not domiciled in the United Kingdom this can have no operation, for in that case the liability for estate duty is limited to property in the United Kingdom.

(4) But rule (3) regulates only machinery and not substance, and there may be a repayment claim. That arises if it is proved that the personal property of the deceased in the country (whether foreign or British Dominion) where the creditor resides is insufficient for pay-

[1] Finance Act, 1909–10, s. 57.

ment of the debt, and to the extent of the insufficiency. This holds irrespective of domicile.

(5) In practice, if there are no assets abroad, a foreign debt is allowed to be deducted in the first instance.

Rule No. 1. (p. 154).—The first of the rules above stated is limited, it will be observed, to debts and incumbrances incurred or created by the deceased. It has no application to debts and incumbrances created by those who went before him, if and so far as those are subsisting at his death. In the application of the rule to debts and incumbrances created by the deceased—

1. Antenuptial marriage-contract obligations and incumbrances cannot be deducted, not even though expressly created in consideration of counter-provisions. Marriage is an onerous consideration, but it is not money or money's worth; and the existence of the counter-provisions is not enough, for marriage is part of the consideration, and the rule says "full consideration in money," etc.[1]

2. The same case shows that interim aliment to the widow under an express obligation is not deductible.

3. The same rule holds when the obligations are not by the intended husband, but by a third party, even the husband's father, and in consideration of a discharge of legitim by the son.[2]

4. Charitable donations not paid before the death, no matter how formally undertaken to be paid, are not deductible.[3]

Rule No. 2. (p. 154).—This strikes at cautionary obligations, including the excess of joint and several obligations beyond the deceased's proper share as between him and his co-obligants. It applies also to the deceased's obligation under a bond and disposition in security which has been taken over by a purchaser under s. 47 of the 1874 Act, where the deceased has a right of relief against both another estate, viz. the bonded heritage, and another person viz. the purchaser. The rule would hold even though there was no agreement under the 47th section if the property had been disponed by the deceased "subject to the bond," or with an exception of the bond from the warrandice clause, for he would have a right of relief against another estate, viz. the bonded heritage. Bills drawn and discounted by the deceased are debts contingently due by him to the bank, but with recourse against the acceptors, and therefore cannot be deducted unless irrecoverable (*Finlay*, 11 October 1886).

There is an exception, and a right of deduction, if "reimbursement cannot be obtained." This points to a right of reimbursement in law, but financial inability on the part of the party liable to make it. If, or so far as, that is so, the debt becomes a true liability of the deceased and is deductible. But it may often be difficult to speak definitely as

[1] *Lord Advocate* v. *Alexander's Trs.*, 1905, 7 F. 367.

[2] *Lord Advocate* v. *Warrender's Trs.*, 1906, 8 F. 371.

[3] *Lord Advocate* v. *Gunning's Trs.*, 1902, 9 S.L.T. 403.

to this at the time of applying for confirmation, and the matter may require to be adjusted later on a repayment claim.

Debts allowed.—1. Rent, taxes, rates, servants' wages, and other payments for terms current at the death, for which the deceased was liable, so far as no arrangement has been made by which the estate will be relieved or reimbursed. It may go much further than this, if the deceased was liable on a continuing contract, and if the asset cannot be got rid of or turned to account. It covers lump sums paid for release, and loss after death,[1] but this was a case of "the failure of a speculation in business."

2. Feu-duties, ground-annuals, annuities, and interest to date of death, or it may be corresponding to the proportion of rent which falls to be included in the inventory.

3. Reasonable mournings for widow, children in the house, and servants. In Scotland there is high authority for these deductions either as debts or as funeral expenses.[2]

4. Deathbed medical attendance and nurses, items which are very often wrongly included as funeral expenses.

5. Where discounted bills appear in the inventory as debts due to the deceased by the acceptors, they may also be deducted in the schedule as debts due to the bank (*Bone*, 25 March 1889).

6. Obligations undertaken by the deceased in a contract of separation with his wife.

7. The lump value of a liability for aliment of an illegitimate child.

8. Where the deceased had paid off a heritable bond, but had taken an assignation instead of a discharge, the bond was included in the inventory and confirmation in order to make up a title and clear the record of the apparent burden, but the debt was held to be extinguished by confusion, and no duty was paid (*Fisher*, 20 Nov. 1890).[3] In other similar cases where the value of the bond is included in the inventory it falls to be also included in the schedule of debts.

9. Where a trustee or executor has invested the trust or executry estate absolutely in his own name, or has immixed it with his own so that it cannot be identified, the amount for which he is liable to the beneficiaries is a deductible debt against his estate.

10. Where a husband has left his whole estate to his wife in liferent and his children in fee, and she has immixed the estate with her own funds, at her death the capital of the estate, so far as not already advanced to the children or expended for their behoof, is a deductible debt due by her.

11. Where the husband had authorised his wife to apply the whole of his estate for her own use during her life, and directed that whatever

[1] *Rossborough's Trs.* v. *Rossborough*, 1888, 16 R. 157.

[2] Stair, More's Notes, cccIxii.; Erskine, 3. 9. 22, 43; Bell, Prin., 1403; Fraser, Husband and Wife, 990.

[3] *Downs* v. *Wilson's Tr.*, 1886, 13 R. 1101.

might remain at her death should go to certain persons named by him, and at the wife's death the estate had increased in value, the capital of the husband's estate was deducted as a debt, and duty was paid only on the difference (*Stephen*, 11 March 1887).

12. Where property belonging to a wife, exclusive of her husband's *jus mariti*, had been immixed with his own funds, its value was deducted as a debt (*White*, 7 June 1889).

13. Where English or Irish leaseholds are included as personal estate, mortgages on them are deductible debts.

14. The deceased had agreed to take shares in a company. At his death they were unissued and unpaid. His liability was entered as a debt, and the shares were confirmed as an asset, in order to obtain a title to transfer (*Hobart*, 6 Feb. 1902).

II. Funeral Expenses

The deduction allowed by s. 7 (1) is of " reasonable funeral expenses." This appears to cover all expenses connected with the interment or other disposal of the remains, necessary and proper according to the rank and circumstances of the deceased. The following are covered—(1) embalming when necessary; (2) carriage home of the remains; (3) cemetery charges, including purchase of space if necessary; and/or (4) cremation expense; (5) undertakers' account. As to mournings, see p. 156. The cost of erection of a tombstone, however, is by a very narrow construction usually said not to be allowable as a deduction, but it is understood that it is passed if directed or authorised in the will.[1]

[1] Hanson, 560.

CHAPTER XI

THE OATH

Oaths and affirmations to inventories of personal estate, and to revenue statements appended thereto, may be taken before the sheriff or sheriff-substitute, or any commissioner appointed by the sheriff, or before any commissary clerk or his depute, or where the office of commissary clerk has been abolished before any [1] sheriff clerk or his depute, or before any notary public, magistrate, or justice of the peace in the United Kingdom, or if taken in England or Ireland before any commissioner for oaths appointed by the courts of these countries, or if taken at any place out of the United Kingdom, before any British consul, or local magistrate, or any notary public practising in the foreign country, or admitted and practising in Great Britain or Ireland.[2]

Where the deponent is unable to sign, a statement to that effect, and of the cause of the inability, is added to the deposition, and the person before whom it is made signs alone.

Where an inventory is given up for the purpose of obtaining confirmation, the oath must be taken by some person who is entitled to confirmation either as executor-nominate or as executor-dative. But if confirmation is not required, and the inventory is given up for the purposes of the revenue, no appointment or decerniture as executor is necessary. Anyone who has an interest as next of kin, legatee, or otherwise, or as representing the beneficiaries in any character, may make oath and pay the duty; every person who intromits with the estate, with or without a title as executor, is bound to do so.[3] When the deponent is acting under an appointment, such as judicial factor not decerned executor, the appointment is exhibited and recorded along with the inventory. If confirmation should be required at any future time, any executor duly appointed may, in a special oath, crave confirmation of the inventory already recorded even though not given up by him, and of course without again paying the duty [Form 68].

Attorney.—Where the executor is abroad, the oath may be taken by an attorney or mandatory. The appointment must be exhibited and signed as relative to the oath, and (if not already registered, either in the books

[1] *I.e.* whether clerk of the court where the business is proceeding or not.

[2] 63 & 64 Vict. c. 55, s. 8.

[3] *New York Breweries Co.* v. *Att.-Gen.*, [1899], A.C. 71.

of council and session, or in the books of a sheriff court) recorded along with the inventory. If the document is in a foreign language, an authenticated translation may be recorded, but the principal must also be exhibited and deponed to. Where the power is merely to make oath to the inventory and crave confirmation, the document containing it is exempt from duty ; [1] but if authority is also granted to uplift and discharge, the deed must be impressed with 10s. [Form 71].

A married woman signs alone, without her husband.

Affirmation.—By the Oaths Act, 1888, every person upon objecting to being sworn and stating as the ground of his objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, is entitled to make a solemn affirmation instead of taking an oath, and the affirmation is of the same force and effect as if he had taken the oath [Form 67 (6)].

Contents of Oath.—The fact of death, and the place and date thereof, must be distinctly set out. The observations made with regard to the corresponding averments in petitions for appointment of executors (p. 78) apply also to those required in the oath, including cases of men in the Great War officially reported missing and presumed dead. The domicile must be stated. When the deponent is an executor-dative, he narrates the decree, and when he is an executor-nominate, the document or documents (such of them as are holograph being expressly so described) containing his nomination, with the names and designations of the whole executors, if any, nominated along with him, and whose nomination may not have been recalled or superseded by the deceased, specifying also those who may have died, or who may have declined to accept the office, and any other specialty affecting the title to confirmation. Where the executors are assumed trustees the deed of assumption, and if trustees appointed by the court the decree appointing them, must be specified and exhibited, and recorded with the inventory [Form 67 (3)].

In all cases the inventory must be deponed to as a full and complete inventory of the personal estate, situated not only in Scotland, or in the United Kingdom, but wheresoever situated, and whether subject to death duty or not. But in cases of domicile out of the United Kingdom all that is required as regards assets out of the United Kingdom is a note of their existence without specification.

At the end of the oath the deponent must state whether confirmation is or is not required. This requirement was introduced under instructions from the commissaries of Edinburgh to their clerks in 1823, following upon the Act of that year which abolished partial confirmations. The Act was read by the commissaries as requiring the executor to make oath that the estate to which he required confirmation was the whole moveable estate known at the time confirmation was applied for, and therefore that if no confirmation was required when the inventory was

[1] 54 & 55 Vict. c. 39.

given up, but should be applied for subsequently, a special oath was necessary to the effect that no additional estate had been discovered. If any new estate should be discovered, it must be given up in an additional inventory, and included in the confirmation. These instructions have always been observed and are still in force. Where confirmation is craved but not expede within six months from the date of recording the inventory, the crave is held to be abandoned, and if confirmation is applied for later, a special oath may be required [FORM 68].

Productions.—It is required by statute that the person exhibiting an inventory must also exhibit therewith "any testament or other writing relating to the disposal of such estate and effects, or any part thereof, which the person or persons exhibiting such inventory shall have in his, her, or their custody or power," and "such testament or other writing (if any such there be) shall be recorded along with the inventory."[1] The production of the testamentary writings left by the deceased, other than those founded on for confirmation, is necessary, not only for the requirements of the revenue, but that it may be ascertained that nothing contained in them affects the appointment of executors. Writings "relating to the disposal of the estate" do not include onerous deeds such as antenuptial contracts of marriage unless they contain testamentary provisions which have become operative. The writings to be exhibited and recorded are—all valid and effectual documents of a testamentary character relating to any portion of the deceased's estate executed by him (*Muir*, 31 July 1880), or by others under powers conferred by him to alter the destination (*Gibb*, 23 Oct. 1866); but not writings which have been revoked or which are inoperative. Where a mutual will had a codicil appended, to take effect only in the event of both parties dying at the same time, and one survived, the codicil was not recorded (*Dalzell*, 8 Dec. 1886). Where two sisters by mutual will left their whole estates to the survivor, and by another mutual will they disposed of the estate after the death of the survivor, who had power to revoke it, the second will, not being a final and effective writing relating to the disposal of the first deceased's estate, was not recorded with her inventory (*Dunlop*, 14 March 1887).

Testamentary writings must be exhibited if in the deponent's "custody or power." Writings are held to be in the "power" of the deponent if an extract or official copy can be obtained. Where an unrecorded document has been lost or mislaid (*Craigie*, 6 July 1875), or where nothing better can be obtained (*Dryburgh*, 4 June 1878), a plain copy has been exhibited and recorded. When the oath referred to a testamentary writing, which had been reduced in absence in respect of non-production, a copy of it, and a certified copy of the interlocutor reducing it, were exhibited and recorded (*Syme*, 8 July 1889). In an oath to an inventory given up by one of the next of kin (no confirmation being required), it was deponed that a will had been proved in Australia by an executor-

[1] 48 Geo. III. c. 149, s. 38.

nominate, that no copy had been received in this country, but that a copy had been written for and would be exhibited at the stamp office when required (*Logan*, 12 Nov. 1883). An application to omit from the record a portion of a writing exhibited has been refused (*Brown*, 19 Dec. 1865). Where additional writings are discovered after the inventory has been given up, but before confirmation is issued, they may be exhibited and recorded with an additional oath (*M'Farlane*, 27 Dec. 1876); if the confirmation has been issued, and an additional inventory requires to be given up, they are then exhibited and recorded (*Seymour*, 7 Jan. 1868). A mutual will, though already recorded with the inventory of the first deceaser, must be again exhibited with the inventory of any other party to it. It is not actually rewritten in the record, but a reference to the previous entry is inserted, and the document is docqueted as having been again recorded.

Amendments.—Where any essential averment has been omitted in the oath, *e.g.* that relating to domicile (*Cook*, 3 April 1888), or where any change of circumstance has occurred after the oath has been taken and before the inventory has been recorded or confirmation granted, *e.g.* the death of an executor (*Ramsay*, 19 Sept. 1882), or the discovery of a testamentary writing (*Collins*, 28 Oct. 1882), an additional oath may be given up either by the same or by any other executor [Form 67 (7)].

CHAPTER XII

DEPARTMENTAL DOCUMENTS

Under the death-duty system as it existed prior to the Finance Act, 1894, the inventory, schedule of debts and funeral expenses, and the oath were all that were required. But the position is entirely changed under the system introduced by that Act, with the result that the requirements have been greatly amplified. That necessarily results from two facts, viz. the executor has (1) to pay estate duty on the whole personal estate of the deceased, no matter in what country situated, if the deceased was domiciled in the United Kingdom, and (2) to give information so far as known to him regarding the heritable or real or immoveable estate of the deceased wherever situated, and also regarding all estate passing or deemed to pass on the death of the deceased, though not belonging to him. The public and the legal profession are indebted to the inland revenue department for the instruction and aid afforded by the printed forms for inventory and all relative documents, which are freely distributed. These are prepared for various situations, but all we shall do here is to go through briefly what may be called the general or leading form :—Form A–1 for use, of course, when the deceased died after 1 August 1894, and for all cases *except* those covered by Form B–1 "Small Estates" or Form A–4, where the whole chargeable property is personal estate in the United Kingdom, and the procedure of the Small Estates Act is not followed.

Departmental Form A–1

First comes the "inventory of the moveable or personal estate and effects, wheresoever situated," which has been already dealt with.

Next comes the oath, also already dealt with.

After that, and before the various "accounts," there are introduced (1) a "Statement of all the property in respect whereof estate duty is payable" and a "Summary of Accounts" bringing out (*a*) the rate of duty, (*b*) the total of estate on which that rate is payable at present, and so (*c*) total amount (including interest) now to be paid. The "accounts" mentioned in this summary are those which follow in the Form.

The Statement on p. 4 of the Form to some extent duplicates the oath. The different paragraphs are as follows :—

1. Deceased's relationships.
2. The accuracy of the inventory, and that it includes "moveable

estate over which the deceased had *and exercised* an absolute power of disposal" (if there was any such).

3. Apportionment of estate among (1) Scotland, (2) England (including Wales), (3) Ireland, (4) abroad.

4. The accuracy of the annexed schedule No. 1, part of "Account No. 1," of (1) debts due to United Kingdom creditors, or contracted to be paid in the United Kingdom, or charged on property in the United Kingdom, and (2) funeral expenses.

5. The accuracy of the annexed schedule No. 2, part of Account No. 2, of (1) other debts and (2) foreign death duty and expenses.

6. The quality of the debts to show that they are deductible.

7. The accuracy of Account No. 3 of moveable property of which the deceased was competent to, but did not, dispose.

8. As to (1) gifts and (2) liferents, annuities, etc.

9. Of any other property in respect of which estate duty is payable on the death.

10. Whether, in addition to paying—as he must—estate duty on (1) the inventory, and (2) Account No. 3 (moveable property of which the deceased might have disposed, but did not), the executor does, or does not, elect to pay estate duty on *all or any* of the property in Accounts Nos. 4 and 5 (other moveable property and heritable property).

11. The accuracy of Schedule No. 5, of debts and incumbrances on heritage, and the quality of these to show that they are deductible.

Account No. 4.—The personal property which requires to be accounted for in Account No. 4 includes:—

1. Donations *mortis causa*.

2. *Inter vivos* gifts without reservation made within three years of death, except where—

(1) The gifts are not more than £100 in all to the donee.

(2) The gifts were prior to 30 April 1908.

(3) The gifts (if made more than one year before death) were made for public or charitable purposes.

(4) The gifts were in consideration of marriage.

(5) The gifts are proved to the satisfaction of the commissioners of inland revenue to have been part of the normal expenditure of the deceased and to have been reasonable, having regard to his income and the circumstances.

3. *Inter vivos* gifts of which *bona fide* possession was not immediately taken and thenceforth retained to the entire exclusion of the deceased, but a benefit, whether charged upon the property or not,[1] was enjoyed by the deceased, or a power or authority was reserved to the deceased to restore to himself, or to reclaim or obtain the absolute interest in, the property or part of it.

4. Policies of insurance which the deceased effected on his life, wherein he either originally or contingently had some interest.

[1] *Lord Advocate* v. *Lord Lyell*, 1918 S.C. 125.

5. Interests and annuities (other than a single annuity not exceeding £25) which the deceased either by himself, alone, or in concert or by arrangement with some other person, purchased or provided so that a benefit accrued by survivorship on the death of the deceased.

6. Moveable property in which the deceased or some other person had an interest which ceased on the death of the deceased, and a benefit accrued or arose to some person, [*except* property to be included in Account No. 6].

To the personal property liable to estate duty fall to be added annuities, other than a single annuity not exceeding £25 (s. 15 (1)),—or other interests purchased or provided for by the deceased, to the extent of the beneficial interest accruing or arising to a survivor on the death of the deceased (s. 2 (1) (*d*)). This provision includes all annuities and allowances payable to the widow or children of the deceased out of the funds of any corporation or society of which he was a member, such as the Society of Writers to the Signet, or the Edinburgh Merchant Company. But pensions by the Government of India to the widows and children of a deceased officer of that Government are exempt (s. 15 (3)).

Heritable property liable to estate duty, which the executor is required to specify in the statement, embraces all real estate in the United Kingdom passing on the deceased's death, under the same circumstances, and on the same conditions, as if it had been moveable estate (s. 1, 2, 3). Heritable (or rather immoveable) estate abroad, not being subject to legacy or succession duty, is exempt from estate duty (s. 2 (2)). Not only heritage of which the deceased was the absolute proprietor at his death, but also heritage which he may have settled in his lifetime, and heritage of which he may never have been absolute proprietor but in which he was interested only as a liferenter or heir of entail, must be set out.

In England and Ireland leasehold property is not real estate but personalty, and it falls to be included in the inventory of personal estate where the duty on it is paid in Scotland.

Settled property is defined as meaning any property or any estate or interest in property which stands for the time being limited to or in trust for any persons by way of succession in whatever manner the settlement may have been effected (s. 22 (1) (*h*) (*i*)). Settled property may be either moveable or heritable. Estate duty is not payable on settled property on the death of any person dying before his interest under the settlement has become an interest in possession where subsequent limitations (liferents) continue to subsist (s. 5 (3)). And by the Act of 1896 estate duty in the case of persons dying on or after 1 July 1896 is not to be levied in the following circumstances—(1) Where a settlor, who is also liferenter, acquires, by the death in his own lifetime of a person who has right to a subsequent liferent or limited interest under the settlement, the immediate reversion or power to dispose of the whole property (s. 14). It will be observed that this applies only when the

liferent which is thus enlarged is that of the settlor, but it appears that under the 1894 Act itself the same thing holds even where the liferent in question is not that of the settlor;[1] (2) where under a disposition the property reverts to the disponer in his lifetime on the death of a person having only a liferent or limited interest under the disposition, unless such person "had at any time prior to the disposition" been competent to dispose of the property (s. 15 (1) (2) (3)); (3) where a husband is entitled in right of his wife to the rents of her heritable estate, and he dies in her lifetime, so that she becomes entitled to the property in virtue of her former interest (s. 15 (4)).

The liferent interests of terce and courtesy conferred by law on a surviving wife or husband are to be regarded as if they had been conferred by the will of the predeceasing spouse. On the death of the survivor, should the property out of which the liferent interest is payable not have already paid estate duty, that duty will become payable to the extent of one-third in the case of terce, and the whole value in the case of courtesy (ss. 23 (19), 2 (1) (*b*), 7 (7)).

1914 Legislation.—Under the Finance Act, 1894 (s. 5 (2)), estate duty was not leviable twice on settled property unless the second deceaser had been competent to dispose of the property since the date of the settlement under which the first payment of duty had been made. To make up for this to some extent an additional duty, called settlement estate duty, was imposed. This has all been changed by the 1914 Finance Act, and that is the greatest alteration in the law of death duty since the third edition of this book appeared. Settlement estate duty is not chargeable on any death after 11 May 1914, and estate duty is chargeable on settled property on every passing even though only from one liferenter to another liferenter. But if duty was paid on the death of one spouse it is not chargeable on the death of the other (1914 Finance Act, s. 14).

This applies to entails in Scotland, again radically altering the prior law.

By the Act of 1896 (s. 21) where on the death of any person dying on or after 1 July 1896 estate duty becomes payable in respect of any property passing under a settlement which took effect before 2 August 1894, and previous to that date any of the following duties have been paid or are payable—viz. the additional succession duties imposed by 51 and 52 Vict. c. 8, s. 21; the temporary estate duties imposed by 52 and 53 Vict. c. 7, ss. 5 and 6; and the 1 per cent. legacy and succession duties; those duties are allowed as a deduction from the estate duty.

In like manner where under the 1914 Act estate duty is chargeable on a death which, under the prior law, a previous payment of duty would have franked, any settlement estate duty which may have been paid is allowed off with interest (1914 Finance Act, s. 14 (*b*)).

[1] *Att.-Gen.* v. *Wood*, [1897] 2 Q.B. 102.

Aggregation.—The rate of estate duty is graduated from 1 to 40 per cent. (1919 Finance Act, s. 29), and is determined by the aggregate value of the various kinds of property upon which it is exigible. Whatever rate is reached it is payable on the whole estate subject to aggregation, but with the benefit of marginal relief (1914 Act, s. 13). This is the principle of aggregation, which may greatly increase the rate of duty, and therefore the total tax. The main features are—(1) aggregation is not limited to what was in substance the deceased's property or at his disposal; it ropes in also all property passing on his death, *e.g.* estate which he liferented; (2) but only estate on which estate duty is leviable; therefore immoveable estate out of the United Kingdom, though belonging absolutely to the deceased, is not brought in; nor, *e.g.* is the value of an annuity which is not chargeable (p. 164), and (3) there are certain exceptions from aggregation; that is to say the excepted assets are dutiable but each class of the exceptions forms an "estate by itself," immune from aggregation with the general estate or with any other "estate by itself," and in like manner not going to swell the general aggregation. These exceptions are :—

1. Property in which the deceased never had an interest.

Examples.—(1) Property of which the deceased's wife is, under a settlement, entitled to the income during the life of the deceased, on whose death the estate goes, say, to the deceased's children. But very little may be an interest, *e.g.* an annuity out of the property,[1] and a contingent interest which never became operative, but quære. (2) Certain life policies kept up for a nominee. (3) Annuities and other interests emerging on the death of a member of a society or company having a widows' or orphans' fund to which its members are bound to contribute, but from which they can derive no personal benefit. It is said that in the Customs Fund each policy is allowed to pass as an "estate by itself."[2]

2. Settled property, where the settlor died before 2 August 1894, and estate duty would have been payable if he had died on or after that date (Finance Act, 1907, s. 16).

3. Small Estates, *i.e.* where the property in respect of which estate duty is payable—exclusive of property settled otherwise than by the will of the deceased—does not exceed £1000 (s. 16 (3)). Settled property is excluded from the computation whether the settlement was made by the deceased himself *inter vivos*, or by some other person, and irrespective of the destination of the property.

There are also other qualifications of aggregation, *e.g.*, interests in expectancy (p. 144), growing timber (p. 150), objects of national, etc., interest (p. 104).

Accountable Parties.—While the executor is bound to disclose and value the whole property liable to duty on the death of the deceased,

[1] *Att.-Gen.* v. *Watson*, [1917] 2 K.B. 427.

[2] Webster-Brown, Finance Acts, 85.

in order to fix the rate of duty, he is not bound to pay any duty except on the executry estate contained in his inventory after deducting debts, and on any other personal estate of which the deceased was competent to dispose at his death. But he may also at the same time pay the duty on any other property included in his statement which may be under his control, and even on property not under his control if requested to do so by the persons accountable for the duty (s. 6 (2)).

The accountability for all duty which the executor is not bound to pay rests on the persons to whom the property passes either beneficially or in trust, and the duty forms a first charge on that property (s. 9 (1)). If not paid by the executor on giving up the inventory, the duty must be paid by the persons accountable for it on a separate account delivered direct to the inland revenue office (s. 8 (4) (5), 6 (4)). Where the executor has paid duty for which the executry estate is not liable, he is entitled to be repaid by the trustees or owners of the property accountable for the duty (s. 9 (4)).

By s. 16 of the Act of 1896 the duty in respect of any annuity or other definite annual sum referred to in s. 2 (1) (*d*) of the Act of 1894 may be paid by four yearly instalments, the first to be due twelve months after the death, plus 4 per cent. interest from a year after death.

By s. 30 of the Act of 1919, simple interest at the rate of 4 per cent. per annum, without deduction for income-tax, is now payable on estate duty from the date of death, except that where the duty is payable by instalments, or becomes due at any date later than six months after death, interest runs only from the date of the first instalment or of the whole duty becoming due. Where, therefore, the duty upon real estate or upon any annuity purchased or provided by the deceased and arising at his death, is paid by the executor, on giving up his inventory of the personal estate within twelve months of the death, no interest is due.

In addition to the special provisions for deferring payment of duty already referred to (pp. 144, 150), power is given to the commissioners of inland revenue, when they are satisfied that the estate duty could not be raised (*i.e.* provided) without excessive sacrifice, to allow payment to be postponed for such period and on such terms as they may think fit (s. 8 (9)); plus interest.

Estate duty is accepted subject to any rectification that may be found necessary on examination of the accounts (s. 8 (7) (12)). Rectification is generally made by the giving up of a corrective inventory. Where a corrective inventory does not contain any additional executry estate of which confirmation is or may be required, it need not be recorded but may be sent direct to the inland revenue office. By the Finance Act 1900 (s. 13 (2)), the commissioners of inland revenue may, if they think fit, accept a statement by or on behalf of any accountable person as a correction of any inland revenue affidavit or account without requiring the statement to be on oath.

Reversionary Transactions.—It may be taken that on all occasions of

legislative increases of duty, whether by raising the rate or otherwise, there have been clauses inserted protecting prior purchasers of, and lenders on, interests in expectancy from being liable for more than would have been payable if the change in the law had not been made. In the case of loans the balance of the duty, as augmented, remains a charge on the surplus, if any, beyond the mortgagee's claims. As instances, see 1894 Act, s. 21 (3), and 1909-10 Act, s. 64.

Marginal Relief.—Referring to the graduated scale of duty printed at the end of this chapter, it may happen that the estate exceeds a step in the scale by only a small sum. In such cases this relief reduces the charge to the amount which would have been payable if that excess had not existed *plus* the excess itself. Thus the duty on £10,050 would, but for this relief, be charged at 5 per cent = £502 10s. This is reduced to 4 per cent. on £10,000 = £400 + the £50 excess,—total duty £450.

Service Casualties.—*General.* In the event of death from wound, accident, or disease contracted within a year preceding death while on active service against an enemy, there may be a remission up to £150 of duty on estate passing to deceased's widow or his descendants, if the total value of the estate duty does not exceed £5000 (1900 Act, s. 14).

The Great War.—Much larger and wider reliefs were given, but it seems unnecessary to set out these now, though they apply to the Army of Occupation (1919 Act, s. 31).

As to Ireland, see s. 43 of Finance Act, 1921.

Quick Successions.—Where two deaths occur within five years of each other there is a certain varying relief given in certain cases. It applies only to land or a business (not a company's business), *e.g.* plant, machinery, stock-in-trade, and goodwill (and other business assets such as cash, book debts, and investments for business purposes ?). It must be the same property on both deaths. It must pass direct from the first successor to the second. The relief is a discount off the second duty varying from 50 per cent., when the interval between the deaths does not exceed one year, to 10 per cent. when it does not exceed five years (1914 Act, s. 15).

Victory Bonds.—These are accepted at par (and accrued interest) for estate duty and other death duties. Nevertheless they are to be valued at market price in the accounts except that, according to the official view, in arriving at the net value of the estate for payment of legacy or succession duty (in *e.g.* a residuary account), a Victory bond for £100, which was accepted at par (and accrued interest) for payment of estate duty, when its market value was, say, £90, must be brought in at the higher figure, and of course the deduction for estate duty paid will also be the higher figure ; but this does not disturb the £90 valuation of the bond on which the amount of the estate was arrived at *for estate duty.*

SCALE OF ESTATE DUTY WHEN THE DEATH OCCURRED ON OR AFTER 31ST JULY 1919.

Where the Principal Value of the Estate				Rate per cent.
			£	£
Does not exceed			100	0
Exceeds	£100	and does not exceed	500	1
,,	500	,, ,,	1,000	2
,,	1,000	,, ,,	5,000	3
,,	5,000	,, ,,	10,000	4
,,	10,000	,, ,,	15,000	5
,,	15,000	,, ,,	20,000	6
,,	20,000	,, ,,	25,000	7
,,	25,000	,, ,,	30,000	8
,,	30,000	,, ,,	40,000	9
,,	40,000	,, ,,	50,000	10
,,	50,000	,, ,,	60,000	11
,,	60,000	,, ,,	70,000	12
,,	70,000	,, ,,	90,000	13
,,	90,000	,, ,,	110,000	14
,,	110,000	,, ,,	130,000	15
,,	130,000	,, ,,	150,000	16
,,	150,000	,, ,,	175,000	17
,,	175,000	,, ,,	200,000	18
,,	200,000	,, ,,	225,000	19
,,	225,000	,, ,,	250,000	20
,,	250,000	,, ,,	300,000	21
,,	300,000	,, ,,	350,000	22
,,	350,000	,, ,,	400,000	23
,,	400,000	,, ,,	450,000	24
,,	450,000	,, ,,	500,000	25
,,	500,000	,, ,,	600,000	26
,,	600,000	,, ,,	800,000	27
,,	800,000	,, ,,	1,000,000	28
,,	1,000,000	,, ,,	1,250,000	30
,,	1,250,000	,, ,,	1,500,000	32
,,	1,500,000	,, ,,	2,000,000	35
,,	2,000,000	.. ..		40

CHAPTER XIII

SMALL ESTATES

This chapter will be read in recollection of the fact that where the net estate, heritable and moveable, falling to be aggregated does not exceed £100, no estate duty is payable, no matter how large the gross amount may be.

The standard of what constitutes a "small" estate differs according as the smallness is regarded with reference to (1) estate duty, or (2) legacy and succession duties.

I. For Estate Duty

Non-Contentious only.—It is held that no application can be received under the small estate Acts where there is competition for the office of executor. In that case a petition must be presented to the sheriff, and a record is made up in common form (*Duncan*, 31 Oct. 1889). When a petition has been presented to the court no application to the clerk under those Acts is received until the petition has been disposed of.

The Intestates Widows and Children (Scotland) Act, 1875, and the Small Testate Estates (Scotland) Act, 1876, were passed to increase the facilities for expeding confirmation, and to reduce expense in cases where the estate is small.

The Act of 1875 applied only to the widows and children of intestates, and to the children of intestate widows, where the whole personal estate did not exceed £150; and the Act of 1876 applied only to executors-nominate where the whole real and personal estate did not exceed that sum; and both Acts were limited to the estates of persons dying domiciled in Scotland. By the Customs and Inland Revenue Act, 1881, the Acts were extended to all applicants for confirmation, wherever the deceased may have died domiciled, if the whole personal estate and effects, without deduction of debts or funeral expenses, did not exceed £300. Under the two earlier Acts the inventory was required to be stamped at the ordinary rate before being recorded; but under the Act of 1881, where the whole personal estate exceeded £100 but did not exceed £300, the fixed duty was £1 10s. In all cases where the deceased died before 2 August 1894 those Acts are still in force.

Further, at least in the Edinburgh commissary court, it is held that to certain effects this 1881 £300 limit is still applicable, irrespective of

the date of death. Note that the limit is £300 gross, but has regard to personal estate only. Thus suppose there is personal estate £250 gross, and heritage £300, the whole is £550, and therefore beyond the 1894 limit stated below, and so the small estates procedure would not be available if the 1881 Act could not be invoked. The question came before the late Professor Sir John Rankine when acting as interim sheriff in Edinburgh in 1900, when he made the following order, dated 5 March 1900 :—

> The sheriff is of opinion that in any case where the gross estate as defined by s. 34 of the Customs and Inland Revenue Act 1881 does not exceed £300, confirmation under that section is still competent, though the deceased may have died after the commencement of the Finance Act 1894, and though the gross estate upon which duty is payable under that Act exceeds £500, and authorises the commissary clerk to receive applications and issue confirmations in such cases in the forms or as nearly as may be in the forms in use under s. 34, the estate duty (if any) being settled by the applicant with the inland revenue department before the inventory is recorded.

This is acted on in practice, but experience seems to show that it is not well known. Where it applies it saves the expense and delay of a petition in intestate cases, but it is not held to preserve the benefit of the 30s. duty on the personal estate.

No interest is chargeable on the duty if paid within twelve months ; but if not paid within that time interest at 4 per cent. is payable from the death to date of payment. The duties are paid by adhesive estate-duty stamps, which are obtainable at any stamp office or at any post office where inland revenue stamps are sold. Interest if due is paid by attaching postage stamps.

Present £500 Limit.—By the Finance Act, 1894, in all cases where the deceased has died after 1 August of that year the limit of value is raised to £500 gross (as explained below). The enactment applies whether the deceased died testate or intestate ; wherever he was domiciled ; whoever may be the beneficiaries or successors ; even though the application is by a creditor or funerator. The estate to be taken into account is the whole heritable and personal estate subject to estate duty, exclusive of property settled otherwise than by the will of the deceased, whether settled by the deceased himself or by some other person. This exception is either very liberally construed or it is in administration expanded, as appears in the next paragraph. To the estate so defined all the privileges and restrictions of the small estates Acts, as regards both duty and confirmation, have been transferred. The fixed duty is £1 10s, where the gross value is over £100 and does not exceed £300, and £2 10s. where the gross value is over £300 and does not exceed £500.

Ascertainment of Limit.—In fixing the amount of the estate with reference to the £300 and £500 limits, regard has to be paid to two factors —(1) What estate is not to be reckoned ; (2) that though the limits bear

to be of gross estate, certain deductions are allowed by statute or in practice.

Estate Excluded.—Heritable estate is included, but whether heritable or moveable the following are not included—

1. Estate settled otherwise than by the will of the deceased, *e.g.* funds settled by himself in his marriage contract, or an investment in name of himself in liferent and a daughter in fee, or possibly a policy under the Married Women's Policies of Assurance Act.

2. A house or other investment taken in name of himself and his wife and the survivor, which is really only another example of Class 1. Such an investment without the survivorship would not be excluded, for it would not be a settlement, unless, perhaps, if it were subject to English law, when survivorship might be implied. It has been officially held that a power to the husband to sell without any consent does not alter the position (*Dand*, 12 Jan. 1904).

3. Interests in expectancy—reversionary interests—whether the payment of duty on them is postponed or not. This is because they are considered to be settled property.

4. As to life policies in cases of presumed death (see p. 79).

5. Property of which the deceased was competent to dispose under a general power, but did not.

6. Any property of which the deceased had only a liferent.

7. In the case of purely agricultural property the 25 years' limit (p. 149) applies.

8. If the deceased was not domiciled in the United Kingdom, Dominion and foreign personal property is excluded.

Deductions.—Notwithstanding the word "gross," the following deductions are allowed—

1. Bonds on heritable property, not created by the deceased.

2. Unpaid price, or part of price, of heritable property.

3. Bonds created to enable heritable property to be purchased (1910 Act 61 (2)).

4. Bonds created to enable heritable property to be built. This probably covers material improvements to land or buildings as well as additions to buildings.

5. Loans, though unsecured, for any of these purposes.

6. Loans on life policies if obtained from the office of issue, or by anyone if intimated to the office.

7. Calls due on shares (?)

The official form contains no schedule of debts, and those various deductions receive effect by reducing the stated value of the assets. Thus, say there is a life policy for £100 with bonus £20, that gives £120, but if there is a loan of £30 from the insurance company with 10s. interest due at the death, these particulars will be stated, and only the difference of £89 10s. will be carried out into the column as the net value of the asset going to bring out the "gross" estate.

Business Liabilities.—Where the deceased was a sole trader, whether under his own or any other name, including an apparent firm name, the business assets are valued without deduction of the business liabilities, except any which may fall within the classes of permitted deductions stated above. But if the deceased was a partner in a true firm, the valuation of his interest is correctly arrived at after allowing for the firm's liabilities.

Aggregation.—Reference is made to the various kinds of property mentioned on p. 172 as excluded in fixing the £300 and the £500 limits. It is said that property settled otherwise than by the will of the deceased cannot be brought in as part of those limits. For example, if the general estate is £350 and there is £150 of settled property, it is said that the £2 10s. fixed duty covers only the £350, and that duty is payable separately on the £150. Even if this be correct, it is the fact that in practice reversionary interests and shares of joint property with survivorship may be roped in with the £300 and £500 limits.

When the aggregated amount exceeds £100 the executor is required to pay the whole duty, £1 10s. or £2 10s. as the case may be. Although there is no express provision on the point, it would appear that in equity the amount paid falls to be apportioned rateably among the different kinds of property—executry estate, heritable estate, and personal estate not executry—and that the executor is entitled to recover from the respective beneficiaries the proportions due in respect of property not under his control. Although property settled otherwise than by the will of the deceased is not included in the aggregation, it also must be specified so far as the executor is able to do so, in order that application for the duty may be made by the department to the parties responsible.

Procedure.—The application for confirmation must be made to the commissary clerk of Edinburgh when the deceased died domiciled in the county of Midlothian; otherwise to the sheriff clerk of the county in which the deceased died domiciled; or, where the deceased died domiciled furth of Scotland, or without any fixed or known domicile, to the commissary clerk of Edinburgh.

Even in intestate cases a petition is dispensed with, and there is no decerniture.

From information supplied by the applicant in regard to the estate and the character in which he may be entitled to confirmation, the clerk prepares and fills up the inventory and oath and relative revenue statement in the prescribed form. If the clerk has reason to believe that the value of the estate exceeds the statutory limit, he refuses to proceed until he is satisfied. He may also require such proof as he may think sufficient to establish the identity and relationship of the applicant. "Relationship" in the extended application given to these Acts means the applicant's title to the office of executor whether arising under a will, or by kinship, or otherwise. The proof required in practice is the evidence of two witnesses who attend with the applicant and whose

depositions are taken by the clerk, and recorded with the inventory and oath. Where the applicant claims under a will, the document itself, if validly executed, proves his title, on his identity being established. Where caution is required the cautioner generally attends with the applicant when the oath is taken, and signs the bond, and he may also be one of the witnesses to the applicant's identity and relationship. Applicants have seldom difficulty in finding caution to the full amount, but when restriction is required it must be applied for by petition in the usual way; it is not part of the clerk's duty to prepare the initial writ. Where the estate exceeds £100 the usual stamp of 5s. is impressed upon the bond. Where the applicant is a creditor or funerator the statutory notice is inserted in the *Gazette*, and a copy is produced before confirmation is issued. The inventory, having been duly deponed to, and stamped, is recorded, and confirmation is expede and delivered to the applicant on payment of the fees. Should the seal of the probate court of England or Ireland [1] be necessary it is obtained by the clerk, before delivering the confirmation to the applicant, transmitting it to the registrar of the court whose seal is required, with a fee of 2s. 6d.

By the Act of 1894, s. 23 (7), it is provided that "an application under the small estates Acts may be made to *any* commissary clerk, and any commissary clerk shall affix the seal of the court to any representation granted in England or Ireland upon the same being sent to him for that purpose, enclosing a fee of 2s. 6d." These provisions remain as yet without practical effect, except that where an English or Irish grant, issued under the statutes relating to small estates in England or Ireland, bears that the deceased died domiciled in England or Ireland, as the case may be, and is sent or presented to the commissary clerk of Edinburgh, along with a full copy, he endorses the certificate necessary to make it an effective title to estate in Scotland, for a fee of 2s.

Optional Procedure.—It is of course not compulsory to proceed under the small estates Acts. Even if not, the fixed duties of £1 10s. and £2 10s. still apply, but—

1. Anyone who is not an executor-nominate must present an initial writ for decerniture as executor-dative.

2. The executor must either do the work himself or instruct and pay a solicitor, instead of having it done by the clerk of court and covered by the scale fee (p. 232).

3. If the English or Irish seal is required, a solicitor in those countries must be instructed, instead of having it done by the clerk of court for 2s. 6d. At least this is the strict rule, but sometimes it can be managed in a simpler and less expensive manner; and when the estate was under £100, and no duty was paid, the English seal was obtained through the commissary clerk for the 2s. 6d. fee (*Nicol*, 1 Feb. 1902).

But, again, it is not to be understood that the small estates Acts are

[1] See Chap. XVII.

excluded merely because the papers are prepared, or so far prepared, before the clerk of court is troubled on the matter.

Additional Estate and Duty Adjustments.—Where confirmation has been issued under the small estates Acts, and there is afterwards discovered additional estate or the need for amended valuation or other corrections, the amount of which, when added to the sum already given up, does not exceed the limit within which confirmation under these Acts is competent, application may be made to the clerk of court to prepare an additional inventory, and to issue an eik under the same conditions as an original confirmation. But where the estate or correction discovered, when added to that originally given up, exceeds the limit within which confirmation under these Acts is competent, the practice has been adopted of granting a title to the new estate in the form of a confirmation *ad omissa*, which confers a distinct title to the estate contained in it, in no way affecting, or depending upon, the validity of the previous confirmation, though granted, it may be, in favour of the same person. Where the original confirmation was granted in favour of an executor-nominate, he may apply for a testament-testamentar *ad omissa* by preparing and giving up an inventory and oath setting forth the circumstances under which it has become necessary. Where the original confirmation was in favour of an executor-dative, he requires, before giving up the new inventory, to apply by petition for decerniture as executor-dative *ad omissa*. Only the newly discovered estate is confirmed, the original confirmation still remaining a sufficient title to the estate contained in it.

If the adjustment brings the total over £100 but not over £300, the £1 10s. duty is payable. If it brings the total over £300 but not over £500, the additional £1 is payable. The official form bears that the fixed duty "is subject to forfeiture" in cases where the estate was sworn not to exceed £300 or £500 and the new estate brings it over £500. That means that no credit may be given for the £1 10s. or £2 10s. previously paid in fixing the new duty on the whole estate. (See the Revenue Act, 1903, s. 14.)

In ordinary cases an allowance is made of the full £1 10s. or £2 10s.

Of course the correction may be the other way about. Owing to wrong entry or over-valuation of assets, under-deduction of such liabilities as are allowed to be deducted, or the amount of ordinary debts or funeral expenses, it may be found that £2 10s. was paid when only £1 10s. was due, or that £2 10s. or £1 10s. was paid when nothing was due. In such cases repayment is obtainable.

Local Facilities.—By the Executors (Scotland) Act 1900, s. 9, applications for confirmation under the small estates Acts may be made to certain inland revenue officers. These officers are authorised to fill up the necessary forms, stamp them when duty is payable, take the oath of the applicant, and transmit the application, along with the prescribed fee, to the clerk of court where confirmation falls to be granted, and on

the confirmation being returned, deliver it to the applicant without further charge. The following are places at which application may be made to revenue officers :—

County.	Town.
Aberdeen	Aberdeen, Huntly, Peterhead.
Ayr	Kilmarnock.
Argyll	Bowmore, Campbeltown, Oban, Port Ellen.
Banff	Banff, Craigellachie, Keith.
Caithness	Wick.
Clackmannan	Alloa.
Dumbarton	Bowling.
Dumfries	Dumfries.
Edinburgh	Edinburgh.
Elgin	Elgin, Forres, Grantown, Rothes.
Fife	Dunfermline, Kirkcaldy, Markinch, Windygates.
Forfar	Brechin, Dundee, Montrose.
Inverness	Broadford, Carbost, Fort-William, Inverness, Lochmaddy, Lochboisdale, Portree.
Kincardine	Stonehaven.
Lanark	Coatbridge, Glasgow, Wishaw.
Linlithgow	Bo'ness, Linlithgow.
Nairn	Nairn.
Perth	Perth, Pitlochry.
Renfrew	Greenock, Paisley.
Ross	Dingwall, Fortrose, Gairloch, Invergordon, Lochcarron, Stornoway, Ullapool.
Roxburgh	Hawick, Kelso.
Stirling	Falkirk, Stirling.
Sutherland	Bonar Bridge, Brora, Tongue.
Wigtown	Wigtown.

Besides, in some courts it is, in suitable cases, permitted that the evidence of identity and relationship may be taken before a justice of peace.

II. For Legacy and Succession Duties

By s. 16 (3) of the 1891 Act where the *net* value of the estate, heritable and moveable, in respect of which estate duty is payable, exclusive of property settled otherwise than by the will of the deceased, does not exceed £1000, then—

1. That property is not aggregated with any other property, but is an " estate by itself," for fixing the rate of estate duty.

2. Where either the £1 10s. or £2 10s. or the ordinary *ad val.* duty is paid, legacy duty and succession duty are not chargeable.

Reference is made to pp. 171–3 as to treatment of property settled otherwise than by the will of the deceased, and other kinds of property excluded in determining the limit, and as to options allowed in practice to the executor. Obviously it is of great importance to bring as much as possible within the £1000 *net* limit in view of the consequent immunity

from legacy and succession duties. A reversionary interest valued at *nil* (p. 148), may be treated as " part " of the £1000, with that result.

Marginal Relief.—This principle was introduced by s. 13 (1) of Finance Act, 1914. In its application to this £1000 limit as regards estate duty, it applies wherever the *net* estate is less than £1010 6s. 3d. The " proper " rate on that sum is 3 per cent., which would amount to £30 6s. 3d. If the *net* estate had been exactly £1000 the rate would have been 2 per cent., and the duty £20. At a figure of £1010 6s. 3d. there is no relief, for what is payable is the £20 plus the sum (£10 6s. 3d.), by which the estate exceeds £1000 ; but at any figure over £1000 and less than £1010 6s. 3d., there is a gain on estate duty.

The gain is greater on legacy and succession duty. Under Finance Act 1914, s. 13 (2), where the net value of the estate on which estate duty is payable, exclusive of property settled otherwise than by the will of the deceased, exceeds £1000, legacy and succession duties are cut down to the amount by which the estate exceeds £1000. Assume all personalty, and legacy rate 10 per cent. Then there is a gain at any figure of estate up to, say, £1100. Apart from this relief, legacy duty would be calculated on, say, £1030 (after deducting estate duty and expenses from the £1100), and at 10 per cent. the duty would be £103, which this relief cuts down to £100. If the net estate is £1001 the legacy duty apart from this relief would be, say, £95 (10 per cent. on £950), but this relief cuts it down to £1.

CHAPTER XIV

CAUTION

It was at one time the practice to require caution from all executors, whether nominate or dative, to the full amount of the inventory. But by the Act of 1823 (4 Geo. iv c. 98) caution was dispensed with in the case of executors-nominate; and restriction of caution was authorised in the case of executors-dative. But ordinary judicial factors do not require confirmation (p. 75), and constructive (p. 46) or statutory (p. 47) executors-nominate are, like all other nominate-executors, entitled to confirmation without caution.

Even yet, however, there are exceptional cases where caution may be, and is, made a condition of issuing confirmation to an executor-nominate; see pp. 53, 55, 62, 202.

Caution still requires to be found by all executors-dative; even factors and curators, who have already found caution as such, must, before being confirmed as executors, again find caution in that capacity.

Caution by an executor-dative cannot be altogether dispensed with (*Preston*, 11 March 1874), but the amount at which it may be fixed is entirely in the discretion of the court. If not judicially restricted the rule is that caution must be found for the full gross amount of the estate in the inventory without deduction for debts or funeral expenses, except as regards the special classes of debts or cross-claims referred to on p. 150. Where this is offered no application to the court is necessary, but if less is offered, there must be an application for—

Restriction of Caution.—The initial writ is by the executor-dative decerned and is to the sheriff. It sets out—

1. The pursuer's inability to find full caution, and the amount to which he asks that caution be restricted.
2. The amount of the personal estate.
3. The amount of the debts and funeral expenses, and whether or to what extent they have been paid.
4. The beneficial successors, their relationship, their respective shares, which of them consent, and the ages of any minor consenters.

Consents.—Under an order by the commissary dated 13 March 1862, when consent is alleged, written evidence must be produced. Where the consenter is unable to write, a verbal statement to the clerk of court,

and certified by him, has been accepted (*Durward*, 9 Nov. 1885; *Thorburn*, 27 Dec. 1886). Consent must be by the beneficiary and not by his agent (*Scott*, 28 Feb. 1879), but consent by a factor or attorney or by an agent will be accepted if he is specially authorised to grant it (*Stewart*, 25 Nov. 1885). Consent by a *curator bonis* or other legal guardian is sufficient (*Szillassy*, 12 Nov. 1886), and consents by minors themselves may also be produced, though the effect to be given to them will depend on the age of the granter (which should be stated), and other circumstances in each case. Under the Guardianship of Infants Act 1886, the mother of pupils acting as their guardian is entitled to consent (*Nimmo*, 3 Nov. 1886).

Objections.—Even if no one appears to object it does not follow that the restriction asked for will be granted (*Nicolson*, 9 Nov. 1871). Anyone desiring to object lodges written objections stating his interest and the ground of his objection. He does not require to state what modified restriction would meet his views.

An objector who alleges a relevant claim is not required to prove it. Where the whole estate was £15,000, and restriction was craved to £300, an objector alleged that he had a claim for £5000 under a will which the executor did not admit to be valid. The commissary depute fixed caution at £5000; the objector appealed on the ground that under the will on which he founded there were other legatees who would have an equal claim on the caution, and that the objector's interest could be secured only by full caution; the commissary sustained the appeal and refused restriction (*Morison*, 13 Nov. 1873); but the will founded on having been reduced, caution was ultimately fixed at £300 as originally craved (23 June 1874). Where an objector alleged that the deceased had not fully accounted for certain funds which he had held as trustee, restriction was refused (*Wilson*, 13 May 1875).

Procedure.—The first interlocutor is one ordering advertisement and allowing objections within 10 days or other time, according to circumstances, after the advertisement. The advertisement states (1) the name and designation of the deceased, and (2) of the executor, (3) the character in which the executor has been decerned, and (4) the sum to which he proposes that caution be restricted; this must be advertised (*Commissary's Order*, 26 Sept. 1870). The application is disposed of by the court in a summary manner with due regard to the circumstances of the case as prescribed by the commissaries' instructions of 31 December 1823. When the 10 days or other period have expired the pursuer lodges the advertisements and any other productions with an inventory. The initial writ and productions are transmitted to the sheriff, who either grants the petition, or appoints a hearing, and thereafter decides. Where objections are lodged, unless the matter is arranged and the objections withdrawn, they are transmitted with the petition to the sheriff, who, either at once or after hearing parties, fixes the amount of caution.

Should the petition be refused or withdrawn, the objector may be entitled to expenses (*Peacock*, 8 March 1889).

Practice.—Where no objections have been lodged, the general rule, subject to modification according to circumstances, is that where the debts have been paid, and all the beneficiaries are of age and represented either as pursuers or consenters, caution to the extent of from five to ten per cent. of the amount confirmed is held to be sufficient. But where these conditions are not fulfilled, the sum will not be limited to less than the amount of the interests of creditors and beneficiaries from whom consents have not been obtained. But it is not to be assumed that the non-consenters would have a preference on the cautionary fund.

Illustrations.

1. The estate had been sequestrated. After the debts were paid there remained in the hands of the sequestration trustee a large balance. It fell to be divided among a great number of next of kin. The whole of these, except two who were insane, had been decerned executors-dative, but they were not in circumstances to find caution to the full amount. The court of session remitted to the sheriff to confirm the persons decerned, on their finding caution to the extent of two twenty-fifth parts of the amount of the inventory, being the amount of the shares of those next of kin who were not to be confirmed.[1]

2. In the case of a French administrator, where there were no debts and no legatees in this country, and the estate in France was sufficient to meet all claims there, on evidence that by the law of the domicile no security was required from the administrator, caution was restricted to £5, though the estate to be confirmed in Scotland was very considerable (*De la Lastra*, 21 Oct. 1889; *De la Torre*, 21 Oct. 1889).

3. Where the deceased was a domiciled Englishwoman, and her husband had been decerned her executor, and averred that he was beneficially entitled by the law of England to her whole personal estate, and the inventory included a heritable bond—it having been questioned whether the bond would go to him or to the next of kin—restriction was craved and granted only to the amount of that bond (*Mayhew*, 14 March 1887).

4. When the mother of beneficiaries who are in pupillarity is executrix, she is not held bound to find full caution for their shares. In a case where the estate was over £60,000, and the whole fell to the widow and her pupil children, she being their sole guardian, as well as executrix, caution was required to the extent of one-half of the amount falling to the children. (*Sim*, 13 Feb. 1901).

5. Where the next of kin are children of the deceased, descendants of predeceasing next of kin are entitled only to share in the dead's part,

[1] *Bell* v. *Glen*, 28 June 1883, not reported.

and not in the legitim fund, and caution required to protect their interests may be restricted accordingly (*Petrie*, 26 Feb. 1890).

6. Where an eik contained estate which had been included in the original confirmation but wrongly described, a restriction of caution which had been granted was held to apply also to the eik, and warrant was granted on the original petition to accept caution to the same extent as in the principal confirmation (*Burns*, 24 Dec. 1885).

Qualification of Cautioners.—1. The cautioners must be resident in Scotland or otherwise subject to the jurisdiction of the Scottish courts. A member of a Scottish firm has been accepted though resident in England (*Dudgeon*, 23 April 1862).

2. They must not be beneficially interested in the succession. This rule is intended to provide against collusive appropriation of the estate by two or more of the beneficiaries without intimation to all parties interested. It is considered that a cautioner who has no interest except to see that all possible claims are satisfied affords the best guarantee that the executor's duties will be faithfully performed.

3. Women, even unmarried women, were for long refused as cautioners, and this practice was sustained by the court of session in times so modern as 1871.[1] But even that was half a century ago; having regard to recent legislative changes applicable to both unmarried and married women the same attitude could not be justified, and in fact they are accepted; so also in England.

4. *Companies.*—The practice is to accept a public company subject to the jurisdiction of the Scottish courts. No company is accepted as cautioner which has not been accepted in the court of session or approved by the accountant of court. In point of fact the great majority of bonds of caution are now granted by companies, and the reasonable footing on which these bonds can be obtained has led to a great reduction in applications for restriction of caution.

5. In some courts there is a rule against accepting as cautioner the agent, or a partner of the firm of agents, acting in the case.

Eiks.—Where there is no new estate or the new estate is of no value (*Wilson*, 22 Sept. 1905), no further caution is required.

The Bond of Caution.—At one time all cautioners resident within the commissariot were required to attend at the commissary office to sign an act of caution in the bond-book of the court, their sufficiency being attested in a separate document; and this form, though neither holograph nor tested, was held to bind the cautioner.[2] This form is still competent; but since the passing of the 1870 and later Stamp Acts, by which a stamp-duty of 5s. must be impressed on the bond where the estate exceeds £100, and a separate bond being generally more convenient, the act of caution has fallen into disuse, and a separate bond is

[1] *French*, 1871, 9 M. 741. But see *Ross*, 1892, 19 R. 500.

[2] *Smith* v. *Kerr*, 1868, 7 M. 42.

used in every case. It is now the practice to require the executor to sign the bond, and from its terms, it would appear to have been originally intended that that should be done. By the terms of the bond both executor and cautioner subject themselves to the jurisdiction of the court in which the confirmation is granted, and appoint the clerk's office as a domicile where they may be cited at the instance of all interested. The effect of this clause now may be doubtful, though it is still adhered to.[1] The bond is prepared by the clerk of court after the name of the cautioner has been submitted; blank bonds are not issued. A form of attestation by a justice of the peace is appended to the bond, and this is generally accepted as sufficient, but it does not preclude further inquiry where required.

Two or more cautioners may be conjoined in the bond, and then the rule is that they are bound jointly and severally, and each is attested as good for the whole obligation. But occasionally where two cautioners have been offered, neither of whom could be attested for the full amount, the liability of each has been limited to one-half of the estate confirmed.

Liability to the 5s. stamp depends on the amount, not of the obligation, but of the estate, so it is payable wherever the sum confirmed exceeds £100, though caution may have been reduced to less than that sum. In the case of a first eik, if the additional estate does not exceed £100, the stamp is waived (*Barclay Tod*, Oct. 1900); and a bond by the widow, child, father, mother, brother, or sister of any common seaman, marine, or soldier slain or dying in the service of His Majesty is exempt from stamp.

The septennial prescription does not apply to bonds of caution for executors.[2] but the cautioner may be relieved from his obligation by the actings of the beneficiaries and executor, if not by mere delay in calling him to account.[3]

The bond of caution is never delivered up. Thus if a factor has found caution both as factor and as executor, the one bond will be delivered up, but not the other.

There is no machinery for substituting one cautioner for another, or for requiring a new cautioner when the original cautioner has become bankrupt, left the country, or died.

[1] *Halliday's Exr.* v. *Halliday's Exrs.*, 1886, 14 R. 251; but see Sh. Ct. Reports vi. 43.

[2] *Gallie* v. *Ross*, 1836, 14 S. 647.

[3] *Macfarlane* v. *Anstruther*, 1870, 9 M. 117.

CHAPTER XV

EFFECT OF CONFIRMATION

Confirmation in favour of an executor-nominate is called a testament-testamentar, and in favour of an executor-dative, a testament-dative: when issued under the small estates Acts, these documents are named respectively a confirmation-nominate and a confirmation-dative.

The Confirmation and Probate Act, 1858, prescribed forms for confirmation. These forms make no provision for including the inventory, but this was rectified by s. 5 of the Executors (Scotland) Act, 1900, which directs that every confirmation shall embody or have appended the inventory of the estate confirmed. This merely regularised what had in most districts been the previous practice.

Even before confirmation an executor is entitled to sue for the estate. Where an executor-dative had been decerned, but was unwilling to incur the expense of confirming a doubtful debt until he had ascertained how much, if anything, he might be able to recover, it was formerly the practice to obtain from the commissary a licence to pursue, which entitled the executor to establish, if he could, the claim against the debtor. Licences, however, fell into disuse, it having been decided that an extract of the decree-dative was equivalent.[1] A general disposition,[1] or a nomination of executor by the deceased, and even (where the domicile was abroad), probate or letters of administration from the foreign court, are held to have the same effect. In like manner an unconfirmed executor may claim and vote in a sequestration.[1] But the rule is that no executor can enforce payment, or grant an effectual discharge, until he has obtained confirmation.[2] By the Inland Revenue Act, 1884, as amended by the Inland Revenue Act, 1889, an exception was created in favour of certain life policies (p. 121), but with that exception the general law was affirmed as follows:—

> Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom.

[1] *Chalmers' Trs.* v. *Watson*, 1860, 22 D. 1060.

[2] Erskine, 3. 9. 39; *Bones* v. *Morrison*, 1866, 5 M. 240; *Hinton, etc.*, v. *Connell's Trs.*, 1883, 10 R. 1110.

Any person paying or transferring funds in this country belonging to a deceased to an executor who has not obtained representation in respect thereof renders himself liable for the estate duty on the funds in question.[1]

The debt or other estate claimed by the executor must be included in the sum confirmed, and it must be confirmed at its proper *value* as at the date of death (p. 151). Partial confirmations were formerly very common (p. 100). After executors had become bound by statute to include the whole estate in the inventory and pay duty thereon, it became the almost universal practice to mention in the confirmation all the items of the estate at their full amount as set forth in the inventory, but to confirm each only to a very small extent—generally from £1 to £10. This was done to avoid the heavy *ad valorem* dues then exigible, but this partial confirmation did not give right to enforce payment of any more than the amount confirmed. Debtors might pay, and in most cases it would appear did pay, but they had always the option of insisting upon confirmation to the full amount of their debts. If they did insist, the executor was obliged to expede an eik, which he could do at any time on finding additional caution and paying the legal dues, if no one with a better title to the office appeared. If, however, the debtors waived their right and paid more than the sum confirmed, they rendered themselves liable to pay over again the unconfirmed part of their debt to anyone who might first confirm to it. Where a sum of £1000, deposited in bank, had been paid to an executor-dative *qua* next-of-kin, on a confirmation of that sum to the extent of £20, the bank was bound to pay £980 to an executor-nominate who afterwards appeared and claimed the money.[2]

Confirmation operates as a complete protection from the penalties of vitious intromission. These penalties include liability for the debts of the deceased. What intromission is to be regarded as vitious is not very clearly defined. Mere continuance in the possession of estate belonging to a deceased, or even taking possession of it for the purpose of its preservation, or for any other necessary or equitable purpose, does not constitute vitious intromission. There must be something from which fraud or misappropriation is or may be presumed. Estate which has been confirmed may be intromitted with by anyone without vitiosity. Vitiosity may generally be purged by a subsequent confirmation expede within a year of the death. Vitious intromission is pleadable only by creditors, not by legatees.[3]

The conditions under which English or Irish [4] estate may be included in an inventory, and in the confirmation, have been explained (p. 102). In order that the confirmation may become an active title to uplift and

[1] *New York Breweries Co.* v. *Att.-Gen.*, 1899, A.C. 62.

[2] *Buchanan* v. *Royal Bank*, 1842, 5 D. 211, and cases cited. See also *Taylor* v. *Forbes*, 1827, 5 S. 785, reversed H.L., 1830, 4 W. and S. 444; *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142; Erskine, 3. 9. 30, 36, 37; Bell, Lectures, 1132.

[3] Erskine, 3. 9. 49–56; Bell, Principles, 19, 21; Bell, Commentaries, i. 705, ii. 81.

[4] See Chap. XVII.

transfer that estate, the clerk who signs it must insert therein or note thereon a statement that the deceased died domiciled in Scotland. It is a sufficient warrant for him to do so that it has been so averred in the affidavit to the inventory. The confirmation, if it includes personal estate in England, must be produced in the principal court of probate in England, and, if it includes personal estate in Ireland, in the court of probate in Dublin, and a copy thereof deposited with the registrars, who must then seal it with the seal of the court in which it is produced, and return it to the person producing it. Thereafter the confirmation has the same force and effect as if a probate or letters of administration, as the case may be, had been granted by the court in which it has been sealed.[1]

Confirmations are sealed in the English and Irish [2] probate courts as a matter of course. Shortly after the passing of the Act of 1858 a case occurred in the probate court in England in which the sealing of a confirmation was objected to by the next of kin on the ground that the deceased had an Anglo-Indian and not a Scottish domicile, and that the will which had been confirmed, though good according to Scots law, was not a valid English will. The judge (Sir C. Cresswell) said that the Act imposed upon the court merely a ministerial duty, its object being to give the Scottish court power to grant a probate which would operate over the whole kingdom. If there was any remedy it must be sought in Scotland, as he did not think the Act gave him any authority to interfere.[3]

It is only when included in an inventory along with Scottish estate that English or Irish [2] estate can be confirmed in Scotland. It is incompetent to issue a principal confirmation containing no Scottish estate, and if issued it would not be sealed by the probate courts. It was even found that an eik containing only English estate, which it was held competent to issue in Scotland, could not be sealed unless the principal confirmation had included both Scottish and English estate, and had also been sealed.[4] But a remedy was provided by the Sheriff Court Act, 1876 (s. 42). Any additional confirmation may now be sealed in the probate courts of England or Ireland whether the original confirmation has been sealed there or not, and although the additional inventory confirmed does not contain any Scottish estate.[5]

Probate in England or Ireland corresponds generally to testament-testamentar or confirmation of an executor-nominate in Scotland. Probate in common form is, like confirmation, granted on an *ex parte* application and without any formal procedure in court. Both probate and confirmation are revocable or reducible on cause shown; but until revoked or reduced each is conclusive evidence of the executor's title to receive

[1] 21 & 22 Vict. c. 56, ss. 12, 13; 39 & 40 Vict. c. 70, s. 41.

[2] See Chap. XVII.

[3] *In the Goods of J. P. Cumming*, Times, 4 Aug. 1859. Followed, *Penny* v. *Penny*, 1891, 7 T.L.R. 403; *Rankine*, 1918, 34 T.L.R. 294.

[4] *In the Goods of J. G. Ryde*, [1870] 2 P. & D. 86.

[5] 39 & 40 Vict. c. 70, s. 42.

the estate and grant discharges. In England probate can be revoked in the court that granted it; but in Scotland reduction of a confirmation, or of the will upon which it has proceeded, is competent only in the supreme court.[1] Probate in solemn form is a contentious proceeding, and its effect is the same as a decree of declarator in Scotland establishing the validity of a will. A grant of probate, however, differs from confirmation in this respect, that while the latter has reference only to the appointment of executors, the former has reference to every part of the testamentary writing or writings of which it is granted. In a confirmation it is only the nomination of executors that is confirmed, and any judgment upon the documents is limited to the validity of that nomination. But in a probate it is the whole contents of the will which are held to be proved, and the validity of every writing included in the probate, whether it relates to the nomination of executors or not, is held to be established. Letters of administration correspond generally to confirmation as executor-dative. Both are granted in cases where there is no executor-nominate. Where the deceased has left a will, it is proved by the administrator, and a copy thereof is annexed to his title. All administrators (with or without a will annexed), like executors-dative, find caution.

By the Confirmation and Probate Act, 1858 (ss. 14, 15), the effect of English or Irish [2] probate or letters of administration may be extended to Scotland by having a certificate endorsed thereon by the commissary clerk of Edinburgh, in the form prescribed by the Act. The probate or letters must have a note or memorandum thereon, signed by the proper officer, stating that the deceased died domiciled in England or in Ireland, as the case may be, and a copy of the document must be deposited with the commissary clerk. And it is enacted that such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland, as if confirmation had been granted there; it being also provided that such probate or letters of administration shall be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom subject to duty. The provision as to "duly stamped," is superseded by the Customs and Inland Revenue Act, 1881. The copy deposited with the commissary clerk is a plain copy of the whole document, including not only the grant but the will, where a will is annexed, and the certificate to be granted must be dated as well as subscribed by the clerk.

Probate and letters of administration formerly proceeded upon an affidavit setting forth only the total amount which the estate did not exceed. But now they proceed upon an account of the particulars of the personal estate for or in respect of which probate or letters of administration are to be granted, and the estimated value. This account, and an affidavit to which it is annexed, correspond generally to the inventory and

[1] Erskine, 1. 2. 6; 1. 5. 28.

[2] See Chap. XVII.

relative oath upon which confirmation proceeds. But neither the probate nor letters of administration contain any of the particulars of the estate in respect of which they are granted, only the gross value of the estate and effects in the account being stated on the grant. No person, therefore, to whom they are presented as a title has any means of knowing from them whether the claim made against him has been included, or at what amount it may have been valued. We are advised from England that no debtor or other party is bound or entitled to concern himself with any such question. These are not questions of title. Thus an executor of a will is entitled to get in the estate and give receipts even before probate, and any assignment of personal estate, even leaseholds, granted by such an executor before probate would be good. It is therefore not a good objection in England against either an executor or administrator that the marking of the gross value—note "value," not "amount"—of the estate amounts to £1050, while the debt, or debenture, or mortgage proposed to be dealt with amounts by itself alone to, say, £1200. Indeed, so far as that goes, the apparent discrepancy might be accounted for by variations in value of the particular debt itself, having regard to s. 7 (5) of the 1894 Act. But the true legal reason goes far deeper than that, as stated above. It may be added that the account of the estate is not in England, as it is in Scotland, available to the public; indeed even the executor or administrator, if he loses his copy, cannot obtain a new copy of his own account without the leave of the inland revenue department.

CHAPTER XVI

TRANSMISSION OF TRUST FUNDS

This chapter has reference to the case of a sole or last surviving trustee or executor dying before the trust or executry estate has been fully distributed, or even, it may be, before it has been uplifted. Here we are concerned only with personal estate. The matter is dealt with in detail in ss. 6 and 7 of the Executors (Scotland) Act, 1900, and it is also affected by the Trusts (Scotland) Act, 1921. Section 7 of the 1900 Act and the 1921 Act apply also to certain cases of incapacity.

But before dealing with these enactments reference may, for the sake of completeness, be made to p. 125 where two special cases are mentioned. These are :—

1. Where the trust funds have become immixed with the individual funds of the trustee so that they cannot be identified. In that case there are really no trust funds at all, and the beneficiaries would have no preference in the bankruptcy of the deceased trustee. There is, therefore, nothing for it but to set out all the extant estate as belonging to the deceased trustee, and then to deduct the trust claim as a debt. In this connection, however, regard must be paid to the rule of law which always assumes that a trustee has used his own money rather than that he has committed a breach of trust. Thus, if trust money is traced into a bank account, any subsequent drawings will be assumed not to have impinged upon that money, and in like manner as to buying and selling, say, consols. It might, therefore, result that the law would hold that the trust fund was identified. That would be very important for the beneficiaries, but apparently it need not necessarily affect the mere technical matter of completing title, for—

2. There is the authority of Mr Currie (3rd ed. p. 141) for saying that, where the deceased trustee has invested the trust money in his own name absolutely, which of course is not inconsistent with the vindication of the investment as specifically trust property, it is open to complete title by including the investment in the inventory as though it were in substance what it is in form, the individual property of the trustee, and deducting an equal sum as a debt. In some cases this would be quite safe, but in others it would be highly desirable to express the debt deduction so as to earmark the investment, and that would be *ex facie* inconsistent, and it would appear that it might be incompetent in view of ss. 6 and 7 of the 1900 Act. In any case it increases the official fees.

1900 Act, s. 6.—This section works by *quasi*-confirmation, not to the original deceased, but to the intervening trustee or executor. It is limited in four ways, viz. : it applies only (1) where the deceased was a trustee or an executor-nominate, including in the latter term those who are constructively held to have been appointed and those who are deemed to be executors-nominate under s. 3 of the 1900 Act, (2) where he has an executor-nominate, (3) to funds in Scotland,[1] and (4) which were " standing or invested in his name as trustee or executor." Within these limits the method is that there may be annexed to the inventory of the proper personal estate of A., the sole or last surviving trustee or executor-nominate of X., a note of the trust or executry funds of X.'s estate in question ; the note is then repeated in the confirmation in favour of B., A.'s executor-nominate, and there is thereby conferred upon B. a title to recover the funds of X.'s estate. But B. is not to continue the administration of X.'s estate ; on the contrary he is to make over the funds in question (1) to the persons legally authorised to continue the administration ; for example, to any substitute trustee appointed by the truster ; or where no other act of administration is required, (2) directly to the beneficiaries ; for example, where the sole or last surviving trustee or executor is the liferenter, and the estate is divisible on his death ; or (3) to any person whom the beneficiaries may appoint to receive and distribute the same.

It will be observed that this section does not help if the deceased was an executor-dative, or, even though not, if *his* executor is an executor-dative ; and section 7 appears to make this absolute, no matter what may be the extent of the beneficial interest of the representatives of the deceased executor. But the deceased may not have been an executor at all, but a trustee. There is no definition in the 1900 Act of " trustee." Clearly it is not confined to testamentary trusts. It must receive at least as liberal an interpretation as in the Trusts Act 1921, including tutors, curators, and judicial factors. But, further, it is thought that it is not so limited as to exclude cases where there is no written constitution of trust apart from the investment itself. Thus it would apply to a bond taken by a father in his own name " as trustee " for his son X. Nor can it be that the very word " trust " or " trustee " is essential ; thus it would, it is submitted, apply to a deposit receipt in name of a solicitor, earmarked as not his property but held by him for X, and that whether the language was " for " or " for behoof of " or " being the property of " ; and it is constantly so applied. But clearly the section has no operation to the case of a mere debtor holding funds which it is his duty to pay over. It is, however, regularly in practice applied to investments and assets standing in name of the deceased *ex facie* absolutely, but which were in fact held by him in trust.

The section is often used in cases in which its use is not really essential. Thus policies under the Married Women's Policies Act are frequently noted in this way at the end of the inventory and confirmation, both

[1] As to England and Ireland, see p. 190.

when they vest by statute in the husband's personal representatives and when they are payable to trustees. It appears that the life offices sometimes like to know that the existence of the policies has in this way been brought under the notice of the inland revenue. And generally it may be said that this s. 6 proves very useful towards the attainment of the practical end of meeting the views and requirements of companies and other parties from or through whom the assets have to be realised, so as to get things done. In particular there is ample evidence that in the Edinburgh commissary court every assistance and facility are offered for the easy dispatch of business; so far from obstacles being put forward on technical or pedantic grounds, suggestions are freely volunteered for utilising and adapting any and every method to overcome apparent difficulties.

Section 6 extends to English and Irish probates if resealed in Scotland, and in these cases there is no room and no need for a note of the funds in question. But the section does not apply to English or Irish letters of administration, not even in testate cases where the grant is letters of administration with the will annexed, but these last would probably come in as "trustee" cases. Thus, taking A. as the original deceased, B. as his executor (or administrator), and C. as B.'s executor (or administrator), the position where English or Irish grants are involved, may be any of the following:—

Section 6 operates:—1. (1) Confirmation of B. as executor-nominate of A. granted in Scotland; and (2) probate of B.'s will in favour of C. resealed in Scotland.

2. (1) Probate of A.'s will in favour of B.; and (2) confirmation of C. as B.'s executor-nominate granted in Scotland.

3. (1) Probate of A.'s will in favour of B. resealed in Scotland; and (2) probate of B.'s will in favour of C. resealed in Scotland.

4. (1) Letters of administration in favour of B. as administrator of A.'s estate with A.'s will annexed, in which B. is trustee and whether resealed in Scotland or not; and (2) probate of B.'s will in favour of C. resealed in Scotland *or* confirmation of C. as B.'s executor-nominate granted in Scotland.

As to this last case note (1), instead of the trust figured, any other trust may be substituted, though having nothing to do with any will, and (2) letters of administration of A.'s will, though with his will annexed, would *not* do as the link.

English and Irish Estate.—So far we have been dealing with personal estate in Scotland only, s. 6 being expressly limited to "funds in Scotland," though of course the local situation of the funds would, for this purpose, be judged of at the death of the executor, and not of an original testator. But there is statutory provision for English and Irish estate also. Curiously enough this was enacted in 1876, whereas the like (but more limited) enactment with reference to Scottish estate was not passed until 1900. The explanation is that the latter enactment only recognised (with limitation) what had been the previous

unauthorised practice. Section 43 of the Sheriff Court Act, 1876, provides:—

> When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto, and signed by the sheriff clerk, a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal court of probate in England, or in the court of probate in Dublin, as the case may be, such confirmation shall be sealed with the seal of such court, . . . and such confirmation shall thereafter have the like force and effect in England and Ireland with respect to such funds as if probate or letters of administration, as the case may be, had been granted by the court of probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the sheriff clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the court of which he is clerk.

This enables resealing to be obtained although the deceased may have had no proper estate of his own in England or Ireland. The fact that the deceased died domiciled in Scotland is set out in the affidavit to the inventory and noted in the confirmation, and a copy of the confirmation is deposited with the registrar when the seal is applied for. Where the trust funds are noted in an original or additional inventory all that is necessary is to set out in the oath that the deceased died domiciled in Scotland, and to crave that the note of trust funds may be inserted in the confirmation or eik in terms of the Act; and in the confirmation or eik the inventory is narrated as having a note of the trust funds set out therein, and the note is inserted. The remedy has been found available also where the trust funds have been discovered after the inventory has been recorded and the confirmation issued, and where there is no additional estate to be confirmed. In this case a special supplementary inventory is given up containing the statement of trust funds, and craving that it be appended to the confirmation, which is produced for the purpose [FORM 69]. On this inventory being recorded the statement is endorsed on the confirmation, signed and sealed, with a note that the deceased died domiciled in Scotland. A confirmation in either of these forms is entitled to the seal of the probate court.

It is only when the note of trust funds is appended to an inventory confirmed that it becomes effectual as a title. If it has been omitted from the original inventory and confirmation, an additional inventory may be given up, and an eik to the confirmation expede. Where no additional estate can be found some item of the estate previously confirmed may be restated at an imaginary and infinitesimal increase of value.

What "Funds"?—The "funds" dealt with under the 6th section of the 1900 Act must be "standing or invested" in the name of the deceased trustee or executor-nominate. Where funds such as stock or shares had not been transferred to the executor's name, but where the confirmation had merely been intimated to the company and noted in their books, the stock or shares cannot be said to be invested in his name.

Funds in that position are still *in bonis* of the original deceased, and, if a title is to be obtained to them by confirmation, it can only be by confirmation *ad non executa*. Indeed there are certain assets which it appears cannot, or often will not, answer to the description of "funds standing or invested" in the name of the deceased, *e.g.* the original testator's corporeal moveables, his shares in trust funds and firms, and book debts. Further it has in some courts been held, that s. 6 does not apply to investments not in the name of the deceased trustee or executor-nominate *as such*.

But it will be noted that the language of the 1876 Act with reference to English and Irish funds is more general.

1900 Act, s. 7.—This section works by confirmation *ad non executa* to the original deceased. It is wider than s. 6. It applies not only on the death, but also on the incapacity, of a sole or last surviving executor, whether nominate or dative. It applies to the whole United Kingdom, subject of course to resealing. It makes it clear that confirmation *ad non executa* is competent whether the estate had not been uplifted by the former executor, or had been uplifted and invested but not distributed, and that it forms a title on which to continue and complete the administration. When the estate had not been "uplifted" by the first executor, it is plain sailing, for the identity of the asset remains intact. But take it that a first executor-dative had collected a lot of book debts from various debtors, and he died with the collection in bank in his name "as executor of X." Here the identity is in a sense completely lost. But that must be taken to be in view in the section, where "unuplifted or untransferred" obviously mean "either (1) unuplifted or (2) uplifted but untransferred"; and with uplifting the identity goes. Effect must be given to the section, and the view is submitted that (X. being the intestate, A. his first executor-dative, and B. executor *ad non executa* under s. 7) in such a case as has been figured the testament-dative in favour of B., as executor-dative *ad non executa* of X., is a good title to B. to uplift the money from the bank, the inventory and grant both bearing in terms that the bank balance and/or deposit receipt represent the book debts (or as the case may be), which were "contained in the original confirmation."

The section provides that confirmation *ad non executa* shall be granted, like the restricted form of confirmation *ad non executa* formerly competent, to the same persons, and according to the same rules, as confirmations *ad omissa*, that is, to the persons who in their order, at the date of the application, would have been entitled to take out an original confirmation, if confirmation had not already been expede.

Section 7 is limited to testamentary cases, there being no reference to "trusts." It is not to prejudice confirmation as executor-creditor.

The view of s. 7 which has been generally received and acted on is that (except so far as otherwise provided by s. 6) it prevents the transmission of any title from a sole or last surviving executor to the executor

of that executor, and that (with the same exception) it renders competent and necessary a confirmation *ad non executa* in every case in which the first executor has died or become incapable without ingathering all the estate or without distributing all the estate. This imports a reversal of the previous law under which every confirmation-dative, granted in favour of an executor who had also either an exclusive or a partial beneficial interest, was regarded as an assignation or procuratory *in rem suam*, the result of which, as expressed by Erskine (Inst. 3. 9. 38), was that "the full right of the subject confirmed, and consequently the right of execution, is transmitted to the representatives of the persons confirming, so that for upwards of a century there have been few or no confirmations *ad non executa*." Very recently, however, eminent counsel have given exactly contradictory opinions on the question whether the section is so framed as to have the result of reversing the common law as thus laid down. The negative is supported on the ground that there is no express enactment in the section to the effect that a confirmation shall become inoperative by the death or incapacity of the executors or of the sole or last surviving executor, but merely a reference to cases where that may be the result, and the negative argument proceeds by showing that under the pre-1900 law that would not be the result, and by contending that the whole section is controlled by its introductory words, and therefore has no operation where under the pre-existing law the confirmation constituted a transmissible title. The conflicting opinions referred to were obtained in a concrete case where a question arose as to the sufficiency of a title to grant a discharge of a heritable bond. The bond had been held by A., who died intestate. His sole next of kin was his sister B. She was decerned and confirmed executrix-dative *qua* next of kin, and completed title to the bond by notarial instrument expressly in the capacity of executrix-dative. B. then died leaving a trust disposition and settlement, and her testamentary trustees purported to complete title to the bond by a notarial instrument proceeding on, *inter alia*, the confirmation and notarial instrument in favour of B. and her will. The debtor desired to pay off the bond, and the question was whether the debt and security would be extinguished by a discharge to be granted by B.'s testamentary trustees without a confirmation *ad non executa* to A. One opinion was that the discharge was good because B. had a beneficial right (it happened to be an exclusive beneficial right, but the opinion would have been to the same effect if the beneficial quality had been partial only); that by the common law, as evidenced by Erskine, that was a title *in rem suam* and transmissible, and that, whatever may have been the intention, s. 7 of the 1900 Act is not so expressed as to operate a repeal; and, in addition to the authority cited by Erskine, a reference was added to the case of *Mitchell*, M. 9264. The other opinion was that the discharge tendered was bad on the ground that s. 7 must be read as a whole, and that so read it has the effect of enacting that there shall for the future be no transmissible title even where there is a beneficial interest, and weight was

placed on the words in the section " whatever may be the extent of their beneficial interest " and on the fact that the saving proviso is limited to confirmations as executor-creditor.

Although it is felt that s. 7 may not be very happily expressed, the view is here ventured that it has the effect of cutting off the transmissible quality of confirmation titles except within the ambit of s. 6, and that accordingly the discharge tendered as referred to in the preceding paragraph did not show a valid title. It is thought that in the contrary opinion above referred to perhaps not sufficient weight has been given to the exact effect of the word " inoperative." When no executor remains to act there is certainly a sense in which the confirmation is inoperative. On this view it is suggested that the simplest way of dealing with such a case would be to complete B.'s title by notarial instrument in her lifetime, and to let the notarial instrument run in favour of her, not as executrix, but as an individual, one of the warrants being an unrecorded assignation by herself as executrix to herself as an individual. After B.'s death that method would not be available, and on the view now submitted confirmation *ad non executa* would be competent and necessary. It might be in favour of B.'s testamentary trustees as representing the beneficial interest. There is nothing against this in s. 7. This has received recognition in a recent decision in the sheriff court at Dumbarton.[1] B. had been decerned and confirmed executor-dative to his son, A. B. died after uplifting, but before fully distributing, A.'s estate. Competing petitions for appointment as executors *ad non executa* were presented by (1) C. and D., B.'s executors-nominate, and (2) E. a brother of A. The sheriff-substitute and sheriff appointed C., D., and E. executors of A. *ad non executa*. Section 7 lays down as the test—who would have been entitled to be decerned executors of A. *ad omissa* ? The case of *Webster* v. *Shiress*[2] shows that the father is entitled to be conjoined with a brother; and the representatives of the father are entitled to stand in his shoes.[3] In passing it may be noted that this illustrates the rule that, in dealing with conjunctions in competitions for appointment as executor, no weight is given to the fact of the number of claimants on either side and the consequent effect on the voting power.

Trusts Act, 1921 :—Under s. 2 of the 1900 Act an executor-nominate received all the powers of trustees under the Trusts Acts, and by s. 2 of the 1921 Act an executor-nominate *is* a trustee, and so all the provisions of that Act apply to executors-nominate. And of course that extends to constructive and statutory executors-nominate, as referred to on pp. 46, 47. Both of these Acts, therefore, confer power of assumption upon executors-nominate. It also results that under s. 22 of the 1921 Act, if a sole or last surviving executor-nominate has died or become incapable, the court of session may appoint a new executor with warrant to com-

[1] *Chrystals*, 1923, S.L.T. (Sh. Ct.), 69.
[2] 1878, 6 R. 102.
[3] Act 4 Geo. IV. c. 98. s. 1 (p. 69 *supra*).

plete title. And under s. 24 of the same Act, if the beneficiaries are absolutely entitled, they may complete a direct title.[1] But these methods have no application in cases of executors-dative.

English Law :—Under reference to p. 64 for the English rule of the chain of representation, the remaining paragraphs of this chapter deal with some specialties which arise in practice, turning on the law of England.

A grant of probate, which included stock in a Scottish bank, had been certified in Scotland, and the executors (*i.e.* whom we call executors-nominate) had intimated the probate to the bank and it was noted in their books. The stock had not been transferred to the executors' names. It was held competent, on the death of all the executors, to expede a confirmation *ad non executa*, as if the stock had actually been confirmed in Scotland, in favour of the executors of the last surviving executor, who by the law of England are entitled to continue the administration.

But where letters of administration including Scottish estate have been sealed in Scotland in respect thereof, and the administrator has died without having uplifted the estate, or has left it standing in his name as administrator, the result is the same as if he had been confirmed executor-dative, and the title to continue the administration of the estate passes not to *his* representatives, but to the representatives of the original deceased. These representatives may complete their title, where the estate in England also remains not fully administered, by obtaining in England a grant of administration *de bonis non* (which corresponds to *ad non executa* in Scotland) of the English and Scottish estate unadministered, and thereafter sealing the grant in Scotland ; or, when the estate in England has already been fully administered, by confirmation *ad non executa* in respect of the Scottish estate alone. The procedure is the same where a last surviving executor-nominate has died without being represented by an executor-nominate. The title to the executry funds vests, not in *his* executor-dative, but in the executor *ad non executa* of the original deceased.

Where a testament-testamentar includes English or Irish estate, and is sealed in London or Dublin, and the executor dies before the estate has been fully administered, the right to continue the administration passes to his executors-nominate if any, on their confirmation being also sealed ; the two sealed confirmations form their title. The funds are usually noted at the end of the copy of the inventory in the confirmation, but this does not appear essential in England or Ireland when any of the proper personal estate of the deceased confirmed is situated in these countries, and the confirmation is on that ground sealed in the probate courts. Nor does it appear necessary that the funds should be standing or invested in the deceased's name as trustee or executor. In many investments trusts are not recognised, and the investors are dealt with

[1] *Cowper and Others*, petrs., 1897, 5 S.L.T. 85.

as the actual proprietors. In order to realise these investments, affidavits as to the fact of trust, in statutory form, are required to be presented along with the confirmation. The chain of executors-nominate may go on indefinitely until the administration is complete, but if any executor dies intestate, the chain is broken, and the executry funds vest, not in *his* administrator, but in the administrator *de bonis non* of the original testator.

Where a testament-dative had been sealed in England in respect of estate situated there, and the executor-dative died before the administration was complete, it was found necessary and competent to take out in the probate court letters of administration *de bonis non* in respect of the funds unadministered, though no similar title could then be granted in Scotland. In the same circumstances it would be competent now to expede confirmation under the Executors Act, 1900, and to seal it in the probate court.

CHAPTER XVII

IRELAND

THROUGHOUT this book numerous references will be found to the resealing in Ireland of Scottish grants, and *vice versa*. All those must be read subject to this chapter. Following on the constitutional changes, there are important alterations in the matters above referred to.

NORTHERN IRELAND

Scottish Domicile: Northern Ireland Estate.—Assume a man dies domiciled in Scotland with personal estate in Northern Ireland.

I. *Death before* 22 *November* 1921

The procedure is exactly as it was before the constitutional changes. It is regulated by what is contained in other chapters of this book. This chapter has no application. This holds irrespective of the date of the application for confirmation.

II. *Death on or after* 22 *November* 1921 *and before* 1 *April* 1923.

The Government of Ireland (Resealing of Probates, etc.) Order, 1922, provides :—

S. 3 (2) Where, in pursuance of s. 13 of the Act of 1858, a Scottish confirmation is produced for the purpose of being sealed in Northern Ireland, then, before the confirmation is so sealed, an affidavit shall be filed and the Northern Irish estate duty or duty in the nature of estate duty (if any) payable in respect of the assets situate in Northern Ireland, shall be paid in the same manner as if an application was being made for an original grant.

(4) Notwithstanding the provisions of s. 48 of the Finance (No. 2) Act, 1915,[1] grants of representation by any court in Great Britain or the Irish Free State shall not have effect with respect to Government stock in Northern Ireland, and grants of representation in Northern Ireland shall not have effect with respect to Government stock outside Northern Ireland, unless sealed or certified in the country where the stock is situate.

The inventory includes the personal estate wheresoever situated, and therefore the estate in Northern Ireland. The debts due to creditors in Northern Ireland become as debts due to foreigners, and are, therefore, not in the ordinary course deductible. Confirmation is obtained, and on

[1] See p. 126.

it the Scottish domicile is certified. The Northern Ireland assets are (in Edinburgh) not entered in the copy inventory prefixed to the confirmation. The confirmation does not include the value of those assets.

When caution is required, the amount is not fixed so as to cover the Northern Ireland assets.

The confirmation when obtained is sent to Belfast for resealing in Northern Ireland. It is there necessary to have an affidavit filed just as if the executor were applying for an original Northern Ireland grant. If the circumstances are such that, if the domicile had been in Northern Ireland, caution (or its equivalent) would have been required, then that may be necessary there.

Estate duty is paid in Scotland on the whole estate, including the Northern Ireland assets. Estate duty is also payable in Northern Ireland on the assets there, and on evidence of payment of that duty being produced in Edinburgh, an allowance by way of refund will be obtained from the estate duty paid in Scotland on the Northern Ireland assets to the amount of the Northern Ireland duty on the same assets; that is to say, the refund is the lesser of the two duties on those assets.

Small Estates.—In applying the £300 and £500 limits of gross estate (as explained in Chapter XIII.) the Northern Ireland estate must be counted in.

III. *Death on or after* 1 *April* 1923

The Government of Ireland (Resealing of Probates, etc.) Order, 1923, provides:—

S. 2. This Order shall apply in the case of persons dying on or after the 1 April 1923, and save as respects persons dying before that date the Government of Ireland (Resealing of Probates, etc.) Order, 1922, shall cease to have effect.

S. 3 (3) Where in pursuance of s. 13 of the Act of 1858 a Scottish confirmation is produced for the purpose of being sealed in Northern Ireland, then, before the confirmation is so sealed, an affidavit shall be filed accounting, in like manner as upon an application for an original grant of representation, for the estate duty, or duty in the nature of estate duty (if any payable in Northern Ireland in respect of the personal property of which the deceased was competent to dispose at his death.

(5) Notwithstanding the provisions of s. 48 of the Finance (No. 2) Act, 1915,[1] grants of representation by any court in Great Britain shall not have effect with respect to Government stock in Northern Ireland, and grants of representation in Northern Ireland shall not have effect with respect to Government stock in Great Britain, unless sealed or certified in the country where the stock is situate in accordance with the provisions of the Acts of 1857 [The Probates and Letters of Administration (Ireland) Act, 1857] and 1858 as modified by this article.

The procedure is the same as is stated above in the case of deaths on or after 22 November 1921 and before 1 April 1923. Estate duty is

[1] See p. 126.

payable in Great Britain on the whole personal or moveable estate, wheresoever situated, of which the deceased was competent to dispose, and on the immoveable estate in Great Britain. This liability is subject to the same arrangements in mitigation of double taxation as between Great Britain and Northern Ireland as obtained between 22 November 1921 and 1 April 1923, as stated above.

Small Estates.—Therefore it results that in applying the £300 and £500 limits the Northern Ireland estate is included.

Northern Ireland Domicile: Scottish Estate.—Assume a man dies domiciled in Northern Ireland with personal estate in Scotland.

I. *Death before* 22 *November* 1921

The procedure is exactly as it was before the recent constitutional changes. It is regulated by what is contained in other chapters of this book. This chapter has no application. This holds irrespective of the date of the Northern Ireland grant and of the date of the application in the commissary office, Edinburgh.

II. *Death on or after* 22 *November* 1921 *and before* 1 *April* 1923

The Government of Ireland (Resealing of Probates, etc.) Order, 1922, provides :—

S. 3 (3) Where, in pursuance of s. 14 of the Act of 1858, a Northern Ireland grant of representation is produced for the purpose of being certified in Scotland, then before the grant is so certified, an inventory shall be filed, and British estate duty (if any) payable in respect of the assets situate in Scotland shall be paid in the same manner as if an original application was being made for confirmation.

The Northern Ireland grant is produced in the commissary office, Edinburgh, with a copy of it. The grant must bear a notation of domicile in Northern Ireland. What is new is that there must be an inventory of the personal estate in Great Britain and Ireland, excluding Northern Ireland, that is, to say Scotland, England, and the Irish Free State. It bears to be an inventory of the personal estate wheresoever situated, because that is regarded as a statutory requirement, but, in point of fact, the only assets specified are those in Scotland and England and Southern Ireland, and there is added a note at the end of the inventory to the effect that there is estate in Northern Ireland which is being administered there, and that is deemed to be a compliance with the statutory requirement of a complete inventory. Debts due to creditors in Scotland, England, and Southern Ireland are in general deductible, but it may be that questions may arise as to the competency of this deduction in special circumstances, *e.g.* a debt due to a creditor in Scotland, but specifically secured on, or payable out of, a Northern Ireland asset.

The inventory is not reproduced in the certificate of resealing, and the resealed grant does not show what the Scottish assets are.

If there are assets in England, there must be a separate resealing in England.

British estate duty must be paid in Edinburgh on the assets in Scotland. An allowance by way of refund will be obtained from the estate duty paid in Northern Ireland on the Scottish assets to the amount of the British duty on the same assets.

In intestate cases caution is required not exceeding the amount of the estate in Scotland.[1] This holds even though the grant has already been resealed in England.

Small Estates.—In applying the £300 and £500 limits, regard is had only to the Scottish, English, and Southern Irish estate.

Confirmation as Alternative.—There is always the alternative of obtaining a Scottish confirmation limited to the Scottish assets instead of resealing the Northern Ireland grant. This course has the advantage that there is prefixed to the confirmation a copy of the inventory specifying the Scottish assets; but, on the other hand, it has two serious disadvantages: (1) there may have to be an application for appointment of an executor-dative or an application for special warrant to issue confirmation, and (2) the official fees are much heavier than for resealing.

III. *Death on or after* 1 *April* 1923

The Government of Ireland (Resealing of Probates, etc.) Order, 1923, provides:—

S. 3 (4) Where in pursuance of s. 14 of the Act of 1858 a Northern Ireland grant of representation is produced for the purpose of being certified in Scotland, then, before the grant is so certified, an inventory shall be filed accounting, in like manner as if an original application were being made for confirmation, for the estate duty (if any) payable in Great Britain in respect of the personal or moveable property of which the deceased was competent to dispose at his death.

Provided that if the British estate duty has already been paid on a prior resealing of the Northern Ireland grant in England under the terms of subsection (2) of this article, then the inventory shall be endorsed to this effect by the commissioners of inland revenue.

The procedure is the same as is stated above in the case of deaths on or after 22 November 1921 and before 1 April 1923, except (1) that assets in the Irish Free State are omitted from the inventory, and (2) as regards the matter of death duty, which is regulated by the above-quoted provisions of the Order in Council of 27 March 1923. Estate duty is payable in Edinburgh on the Scottish, or Scottish and English, estate, unless it has already been paid on resealing in England.

Irish Free State (*Saorstát Éireann*)

In the case of deaths before 1 April 1923, there is no alteration in procedure from that which obtained before the constitutional changes.

[1] *Brogan*, 1922, 38 Times L.R. 843.

In those cases mutual resealing proceeds. Those things hold irrespective of the date of the Irish grant or of the Scottish confirmation, and of the date of the application for resealing.

When the death occurs on or after 1 April 1923, the matter of confirmation and resealing procedure has not been regularised up to the time of publication.

As regards estate duty in the case of deaths on or after 1 April 1923, " arrangements for relief in respect of double taxation " as between Great Britain and the Irish Free State are contained in Part II. of the Schedule to the Order in Council (Double Taxation—Irish Free State—Declaration) of 29 March 1923, which is as follows :—

(*a*) Where the commissioners of inland revenue are satisfied that estate duty is payable in the Irish Free State by reason of a death of a person dying on or after 1 April 1923, in respect of any property situate in the Irish Free State, and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the estate duty payable in Great Britain in respect of that property on the same death.

(*b*) Where the revenue commissioners of the Irish Free State are satisfied that estate duty is payable in Great Britain by reason of a death of a person dying on or after the said first day of April in respect of any property situate in Great Britain and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the estate duty payable in the Irish Free State in respect of that property on the same death.

(*c*) Any question as to whether any property is to be treated for the purposes of this arrangement as situated in Great Britain or in the Irish Free State shall be determined according to the laws in force in England and Ireland on 6 December 1922.

(*d*) This arrangement shall apply as between Northern Ireland and the Irish Free State in like manner as it applies as between Great Britain and the Irish Free State until the Government of Northern Ireland signify that they have withdrawn their consent to such application.

As between Great Britain and the Irish Free State the effect of the above Order is expressed in an official announcement as follows :—

Each country will allow from the estate duty payable therein by reason of a death, in respect of property situate in the other country, a sum equal to the amount of the estate duty payable in the other country in respect of the same property on the same death.

CHAPTER XVIII

DOMINION GRANTS

By the Colonial Probates Act, 1892, provision is made for reciprocity in the matter of title to executry estate between British Dominions and the United Kingdom, similar to that already established between Scotland, England, and Ireland. The Dominions to which the Act applies are fixed by order in council on evidence that these Dominions have made corresponding provision as regards titles granted in the United Kingdom. By s. 3 the operation of the Act is extended to British courts in a foreign country, such as the consular courts in Turkey and China, and in these foreign cases the application of the 1892 Act is automatic without an order in council under that Act.

Any probate or letters of administration granted by a court to which the Act applies *may* on certain conditions be sealed in the sheriff court of Edinburgh (and also in London and Dublin), and thereupon it has the like force and effect, and the same operation in the United Kingdom, as if granted in the court in which the same are sealed. This makes probate equal to confirmation as executor-nominate, and letters of administration equal to confirmation as executor-dative.

It is to be noted that the court in this country which is applied to has a discretion to reseal or not; which is in contrast to the position in resealing of United Kingdom grants within the United Kingdom under the 1858 Act.[1]

Assuming the discretion to be exercised in favour of resealing, the 1892 Act itself prescribes certain conditions, and it authorises others. The court "shall" be satisfied—

1. That United Kingdom estate duty has been paid so far as due.

2. That, when letters of administration are to be resealed, caution has been given to an extent sufficient to cover the United Kingdom personal estate.

And the court "may"—

3. Require evidence of domicile.

4. Require security for payment of debts to creditors residing in the United Kingdom, if any creditor so moves the court. This holds whether the grant is probate or letters of administration.

The following are the substantive parts of the regulations made by the sheriff of the Lothians and Peebles for applying the Act:—

[1] *Rankine*, [1918] P. 134.

1. When any probate or letters of administration granted by a court of probate in any British Possession to which the Act applies is produced along with a copy thereof in the sheriff court of Edinburgh, it shall be sealed by the commissary clerk with the seal of office of the commissariot of Edinburgh.

Provided—

(1) That a duly stamped inventory, with relative oath in the ordinary form modified to suit the circumstances, has been exhibited in said court, which inventory, after being recorded, shall be transmitted to the commissioners of inland revenue: but it shall not be necessary to record along with said inventory any testamentary writings of which a copy is deposited in terms of the Act.

(2) That, in the case of letters of administration, caution has been found to cover the estate in Scotland given up in such inventory, and that such caution shall be subject to the same rules as regards restriction thereof, the terms of the bond, and otherwise, as are applicable to caution for executors-dative.

(3) That no application has been made under sub-section 3 of section 2 of the Act, or that such application has been disposed of, and that any such application shall be by petition to the sheriff.

2. The oath to the inventory shall set forth the domicile of the deceased at the time of his death; and where, on any ground, it may appear doubtful whether the person or persons, in whose favour the grant of probate or letters of administration has been made, would be entitled to confirmation in Scotland, such grant shall not be sealed without the special authority of the sheriff.

In England it has been held that a limited Dominion grant may be resealed under the 1892 Act.[1]

Many United Kingdom life assurance companies have authority in their constitutions to pay on Dominion grants without resealing, but that of course does not waive United Kingdom death duty. As to life policies see also p. 121.

Where the deceased has died domiciled abroad with estate in England or Ireland to which a title is required, the grant of probate or administration must be sealed also in these countries. Payment of estate duty on the whole estate in the United Kingdom is made where resealing is first applied for, and in any subsequent application a certificate is granted by the inland revenue that the duty has been paid. Where the application is under s. 3, and estate duty is exigible on the personal estate wheresoever situated, the whole duty must be paid in this country, and application can then be made for refund of any duty paid on the original grant.

The oath is almost always taken by an attorney or mandatory for the executor or administrator under the necessary power [Form 71]. Both in Edinburgh and in London it is held that any certified copy

[1] *Smith*, [1904] P. 114.

produced under s. 2 (4) of the Act must contain a complete copy of the grant; a mere exemplification of the will, bearing that it has been proved, though it might be a sufficient warrant for confirmation, is not entitled to be resealed.

The Dominion Acts, giving corresponding privileges to British grants of confirmation, probate, etc., in the Dominions, are all in similar terms, and the resealing is carried through under the like conditions and with the like force and effect. For the purpose of being sealed in any court where resealing is competent, the document sent from Scotland is either the confirmation itself or a duplicate thereof, or an extract of the confirmation without the inventory, and where there is a will it is usual to send an extract of it. Though it forms no part of a confirmation, the will, where there is one, is always annexed to the grant both of probate and of letters of administration, and it is generally considered safer that, where a confirmation is to be used as a substitute for these titles, it should be accompanied by an authenticated copy of the will.

The following is a list of the Dominions to which the Act has been applied:—

List of Dominions, Colonies, and Protectorates to which the Colonial Probates Act, 1892, has been extended.

Name.	Date of Order in Council.
Ashanti	13 August 1920.
Australia, Commonwealth of—	
New South Wales	30 January 1893.
Papua	30 September 1914.
Queensland	19 May 1899.
South Australia	16 May 1893.
Tasmania	29 January 1894.
Victoria	30 January 1893.
Western Australia	15 March 1893.
Bahama Islands	23 November 1893.
Barbados	29 January 1894.
Bermuda or Somers Islands	8 May 1919.
British Guiana	16 May 1893.
British Honduras	30 January 1893.
Canada, Dominion of—	
Alberta	11 February 1913.
British Columbia	26 October 1896.
Manitoba	27 November 1896.
North-West Territories	18 May 1897.
Nova Scotia	26 October 1896.
Ontario	15 March 1893.
Saskatchewan	11 February 1913.
Ceylon	22 December 1921.
East Africa Protectorate	6 November 1916.
Falkland Islands	3 October 1895.
Fiji	30 April 1894.
Gambia	14 February 1921.
Gibraltar	30 January 1893.
Gold Coast	16 May 1893.

Name.	Date of Order in Council.	
Grenada	3 February 1898.	
Hong Kong	15 March 1893.	
Jamaica	18 July 1894.	
Nigeria (formerly Lagos)	29 January 1894. 17 May 1920.	
Leeward Islands	6 March 1896.	
Newfoundland	20 May 1903.	
New Zealand	30 January 1893.	
Nyasaland Protectorate	7 September 1916.	
St Helena	29 January 1900.	
St Lucia	17 July 1917.	
St Vincent	19 May 1898.	
Sierra Leone Colony	30 March 1916.	
Sierra Leone Protectorate	30 March 1916.	
South Africa, Union of	21 January 1914.	
Cape of Good Hope	30 January 1893	Revoked by O. in C. of 21 Jan. 1914, applying the Act to the Union of South Africa.
Natal	2 February 1895	
Orange River Colony	23 October 1905	
Transvaal	16 February 1903	
South Africa—		
Bechuanaland Protectorate	6 November 1916.	
Northern Rhodesia	6 November 1916.	
Southern Rhodesia (28 July 1906, revoked)	6 November 1916.	
Swaziland	6 November 1916.	
Straits Settlements	16 May 1893.	
Trinidad and Tobago	27 June 1894.	
Uganda Protectorate	30 March 1916.	
Wei-hai-wei	6 November 1916.	
Zanzibar	30 March 1916.	

CHAPTER XIX

ADDITIONAL INVENTORIES AND CONFIRMATIONS

The Revenue Act of 1808 provided that if, after recording the original inventory, additional estate should be discovered, an additional inventory should be recorded, in which the amount of the original inventory should be specified, within two months of the discovery. As by s. 42 of the same Act an executor is entitled to recover only such estate as has been included in an inventory, it may be necessary to lodge an additional inventory even though no additional duty is payable, and this must of course be done in all cases where further confirmation is required. It is not, however, to be inferred that an "additional" inventory will always show additional value; it may contain only one item, and it stated to be of "no value"; and an eik to the confirmation will issue accordingly (*Wilson*, 22 Sept. 1905). The item consisted of shares saleable only at a discount, and though it was an intestate case no further caution was required.

In lodging an additional inventory it is competent at the same time to correct any error that may have been made in the original inventory. Estate which has been over-estimated may be set out at its true value, and the difference deducted, and should any item have been wrongly included, that also may be deducted. The schedule of debts may also be amended either by addition or deduction so as to bring out the true net value of the estate. Where no debts were previously deducted, this may be done per schedule in the additional inventory. Where in the interval between lodging the original and additional inventories, a refund of duty has been obtained on the ground of debts, the amount returned must be taken into account in adjusting the duty. Where inventories have been received at the stamp office without being recorded, the estate contained in them must be included in any additional inventory afterwards lodged for confirmation, and the duty paid accordingly, or a certificate from the inland revenue written thereon that the duty has been paid [Forms 67 (7–9)].

Eiks to Confirmation.—It was always competent for an executor who had expede a partial confirmation to add or eik thereto any additional item of estate, or the additional value of any item. By the Act of 1823, the Act which abolished partial confirmation, it was declared to be still competent to eik to the original confirmation any estate afterwards

discovered, but the eik must contain the whole of the additional estate. If confirmation of the additional estate is required, and no part of the estate has been previously confirmed, then, as there can be no partial confirmation, the whole must be included in the confirmation craved (4 Geo. IV. c. 98, s. 3). The grant is in that case the principal confirmation, though proceeding on an additional inventory. If confirmation has already been obtained, and the additional inventory is lodged by the executors already confirmed, or by any persons whom they may have assumed to act with them, the additional estate may be confirmed in the form of an eik, which, though a separate document, is really an addition to the original confirmation. A substitute executor has in some instances expede an eik (*Murray*, 1 Feb. 1886), but a confirmation *ad omissa* appears to be the more correct form. The amount of the estate already confirmed is narrated in the eik, but the sum confirmed and the title granted are limited to the additional estate. The first eik applied for is so named, but there may be a second and a third eik, and more if required [Form 79].

Where estate contained in the original inventory and confirmation has been so inaccurately entered or described that it cannot be uplifted by the executors—where, for example, an item has been entered as Scottish instead of English—the remedy is to lodge a corrective additional inventory, in which, after setting out the amount in the original inventory, and deducting the value of the items incorrectly entered, those items are set out as new or additional estate under the head of effects omitted. If correctly valued in the original inventory, no further duty is payable, and an eik is issued in ordinary form containing the corrected entry.

Omissa vel Male Appretiata.—Confirmation *ad omissa vel male appretiata* is competent where any estate has been omitted or undervalued in the original confirmation. Any person having interest may apply for it, but he must call the principal executor confirmed as a party, and if it appears that the executor has neither left out nor understated any item *dolose*, the items omitted, or the difference between the estimations in the principal confirmation and the true value, may be added as an eik.[1] Where one next of kin had been confirmed, and another applied to be decerned *ad omissa*, and claimed to be a creditor on the executry estate, alleging that the executor had omitted a debt due by himself, which, however, the executor did not admit, both were decerned executors-dative *ad omissa* ; but as they could not agree as to the estate to be given up, confirmation could not be proceeded with, and a judicial factor was appointed (*Campbell*, 13 Oct. 1879). But where a next of kin applied for appointment as executor-dative *ad omissa*, either alone or along with another next of kin already decerned and confirmed, the application was refused, no sufficient ground being set forth why the executor already confirmed should not be allowed to expede an eik, which he was will-

[1] Erskine, 3, 9. 36, 37 ; *Norris* v. *Law*, 1738, Elchies, Executor No. 6.

ing to do, and continue the administration (*Turnbull*, 13 March 1885). Where the principal executor, however, is an executor-creditor, he is not entitled to prevent another creditor being decerned and confirmed *ad omissa*; but he may be conjoined with him.[1] Confirmation *ad omissa* is the competent form of title where, in consequence of the death or resignation of all the executors originally confirmed, an eik cannot be obtained, and where a title is required to some item of estate omitted or undervalued in the original confirmation, and which therefore still remains *in bonis* of the deceased[2] (*Warrender*, 11 Jan. 1884; *Jazdowski*, 19 March 1889); and where the original executor declines to move, an executor *ad omissa* may be appointed and confirmed (*Darling*, 15 June 1906).

Confirmation *ad omissa vel male appretiata* may be issued in favour of the persons who would be entitled to an original confirmation. Any substitute executor or testamentary trustee or beneficiary entitled to confirmation as executor-nominate would be entitled in the first place, whom all failing, the next of kin, and other parties, in their order, entitled to decerniture as executor-dative. The confirmation must, like an eik, contain the whole of the estate not already confirmed, unless when expede by an executor-creditor. The estate to which a title is sought may have been entered in an inventory of which a creditor has expede a partial confirmation, or in an additional inventory of which no confirmation has been issued, but in so far as it is unconfirmed the new executor is entitled and, unless a creditor, bound to confirm the whole. If already given up and the full amount of duty paid, it will be necessary for the new executor only to give up in his inventory *ad omissa* the unconfirmed portion of the estate, without paying any duty on it, and to crave confirmation thereof (*Bradley*, 4 June 1884). If the estate requiring to be confirmed has not already been included in any recorded inventory it will fall to be given up in the inventory *ad omissa* as additional estate and duty must be paid on it. Confirmation *ad omissa* is a good title to call upon the representatives of any previous executors to account for such portions of the estate as they may have intromitted with or included in their inventory but not confirmed.[3] It is not necessary for a creditor or next of kin to be confirmed *ad omissa* in order to call upon the original executor to account for funds in his possession, though not included in his confirmation[4] [FORMS 55, 67 (8), 80, 81].

Non Executa.—Confirmations *ad non executa* have already been dealt with in connection with the transmission of trust funds (p. 192). The estate to which a title may be thus completed is not now limited, as formerly it was, to funds of which a previous executor-nominate had obtained confirmation, but which he had neither uplifted nor had trans-

[1] *Lee* v. *Donald*, 1816, 19 F.C. 118; *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142.

[2] *Atkinson* v. *Learmonth*, 1808, 14 F.C. 76.

[3] *Nicol and Carny* v. *Wilson*, 1856, 18 D. 1000.

[4] *Smith* v. *Smith*, 1880, 7 R. 1013; see also *Torrance* v. *Bryson*, 1841, 4 D. 71; Erskine, 3. 9. 36.

ferred into his own name. The inventory given up and confirmed may now include the whole estate of the deceased already confirmed which remains not fully administered. The executors *ad non executa* are the same persons who are entitled to be executors *ad omissa*, including universal legatees, who will when necessary be confirmed as executors-nominate *ad non executa* by virtue of s. 3 of the 1900 Act (*Forrest*, 9 March 1904). If they are not entitled to confirmation as executors-nominate, they require in the first place to obtain decerniture as executors-dative [FORM 56].

Where an additional confirmation has been granted, whether an eik, confirmation *ad omissa*, or confirmation *ad non executa*, containing English or Irish estate, it is entitled to be sealed in the principal Registries of the English and Irish Probate Courts in the same manner as an original confirmation.

Where estate in Scotland has been included in a grant of probate or letters of administration in England or Ireland and sealed in Scotland, any additional Scottish estate afterwards discovered may be given up and a title to it obtained in the court where the original grant was made. This is done by having the amount of the estate resworn and a marking to that effect made on the probate or letters of administration, which is again exhibited in Edinburgh and certified by the commissary clerk.

Corrective inventories are frequently necessary though there may be no additional estate to give up and confirm, the object being to adjust the payment of estate duty. The following regulations are issued by the inland revenue in regard to these inventories :—

1. The deposition should be made by the executor personally.

2. In cases where *too little duty* has been paid the corrective inventory must be presented within two calendar months after the discovery of the mistake, for payment of the deficient duty and interest. Before calculating the amount of the additional duty, correction can be made of any insufficient deduction in respect of debts and funeral expenses. But allowance cannot be claimed for the fixed duty of 30s. or 50s. paid on estates now to be amended as exceeding £500 in value, unless the deceased died on or after 1 September 1903, and the commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property. [See Revenue Act, 1903, s. 14.]

3. When the corrective inventory has been duly stamped it should be *at once* lodged with the commissary or sheriff-clerk, if it contains any additional executry estate of which confirmation is, or may be, competently required ; if it contains no such estate, the corrective inventory should be at once forwarded to the registrar, estate duty office, Edinburgh, asking that same may be filed without being recorded. Attention to the speedy disposal of corrective inventories will prevent unnecessary application to the parties liable.

Where, however, confirmation is not required, the fact can be stated on the Warrant, D—4, and a request can be placed thereon that the

corrective inventory, after being stamped, may be passed direct to the registrar for the purpose of filing in the estate duty office.

4. "Delivery" takes place only when the inventory is delivered for recording in the court books or for filing in the estate duty office.

5. In cases where *too much* duty has been paid, written application should be made, with full explanation of the circumstances, to the registrar, estate duty office, Edinburgh, the corrective inventory (duly deponed to) being sent therewith.

6. No return of duty can be made except on the executor's own deposition, or, if he is dead, upon that of the executor on his estate.

7. Where return of estate duty is claimed on ground of debts or incumbrances, it will require to be shown that the same are within the allowance authorised by s. 7 (1 and 2) of the Finance Act, 1894.

8. Upon the claim being established, and all death duties then due having been paid, the authority of the commissioners of inland revenue will be obtained for the repayment, which will then be notified by the comptroller (Scotland).

But with reference to these regulations, it is to be noted that important adjustments of estate duty, both ways, take place in much less formal manner.

CHAPTER XX

PRIVILEGED ESTATE

The privileges here referred to are the qualities which attach to certain assets of being—

1. Disposable on death by informal testamentary documents called nominations, entitling the nominee to payment without confirmation ;

2. Recoverable, even in the absence of a nomination, without confirmation ;

3. Exempt from death duty to a greater or less degree.

These privileges appear for the most part in connection with small estates, but that is not always so. Thus the first of the above privileges attaches to deposits in savings banks, including holdings of Government securities and annuities and life assurance, and any limit on these has now been removed by the Savings Bank Act, 1920. And as to exemption from death duty, the records of the commissary office, Edinburgh, show the case of a private in the Imperial Yeomanry whose estate of over £22,000 was relieved from all liability for estate duty under the general exemption in favour of common soldiers. In s. 8 (1) of the Finance Act, 1894, there are saved the then

> existing law and practice . . . for the exemption of the property of common seamen, marines, or soldiers who are slain or die in the service of His Majesty, and for the purpose of payment of sums under £100 without requiring representation.

This reference to sums " under £100 " is an instance of the very common error of so expressing it when what is really meant is sums " not exceeding " that sum, and it is in practice applied in the latter sense.

I. Nominations

The rules of different bodies and authorities, *e.g.* savings banks, friendly societies, industrial and provident societies, differ not a little from each other. Some of these differences are noted below, but it is not pretended that the treatment in that respect is exhaustive, and it may not, in all cases, supersede more minute inquiry. But they all agree in this, that the rules of Scots law requiring a will to be holograph or attested by two witnesses do not apply ; as to mark, see p. 212. They constitute really a very important class of privileged " writings." But from the point of view of Scots law there is one respect in which they are

the reverse of privileged, for the nominator must, we think invariably, be sixteen years of age. They are all examples of the old Scottish principle of special assignations, which has been developed to some extent in previous chapters; and in accordance with that principle they all agree in entitling the nominee to payment or transfer without confirmation. They introduce into our law the objectionable feature of being revoked by subsequent marriage, though it is understood that that is not so in the case of industrial and provident societies. On the other hand they are usually not revoked by the birth of a child, this being sometimes express, and in other cases it results from a condition that a nomination shall be revocable in specified ways only and not otherwise or in any other event.

Execution.—If a nomination is required to be "under the member's hand," it has, on what appears to be a narrow reading, been held that if made in Scotland by mark, though attested by witnesses, it is invalid (but see p. 216); and in a case like that it cannot take effect as a will.[1] The same results would follow when the rules require that the nomination shall be "signed." But these rules cannot be taken absolutely, for, while the post office savings bank regulations require that nominations shall be "signed," the official forms provide for execution by mark when the nominator cannot write. One witness is invariably required and is sufficient. The witness cannot be the nominee.

Intimation.—It is an invariable rule that the nomination shall be sent to the society or authority, and in the lifetime of the nominator. It may be retained by the society or (*e.g.* post office savings banks) returned to the custody of the nominator.

As a Will.—If by reason, say, of non-intimation, or because in Scotland the nominator, though out of pupillarity, was under sixteen, the nomination fails as such: it may take effect as a will,[2] but only if duly executed as such. There might then be a conflict between it and a general will, especially if the will were later in date.

Revocation (*supra*) is effected by intimation of a special form of revocation in the revoker's lifetime. A will cannot operate as a revocation,[3] but this may protect the nomination only as an administrative, and not as a beneficial, title.[4]

Nominees.—Sometimes it is expressly stated that the nominated sum may be divided among two or more nominees, and it is assumed that that is always implied.

Nominee's Predecease.—In this case it has been held in England that the legal personal representative of the nominee is entitled to the money.[5] But the post office savings bank regulations, 1921, 68 (1), provide that the nominee's death in the lifetime of the nominator revokes the nomina-

[1] *Morton* v. *French*, 1908 S.C. 171.

[2] *Re Baxter*, [1903] P. 12.

[3] *Bennett* v. *Slater*, [1899] 1 Q.B. 45; Industrial and Prov. Soc. Act, 1893, s. 25 (2); Post Office Savings Bank regulations, 1921, 68 (3).

[4] *Young* v. *Waterston*, 1918 S.C. 9.

[5] *Caddick* v. *Highton*, [1899] 68 L.J. Q.B. 281.

tion, and so do the National Savings Certificates regulations, 1919. For a special rule, borrowed from English law, see p. 216.

Limit of Amount.—There usually is a limit of £100 in the amount which may be nominated, but in savings banks there is now no limit (1920 Act, ss. 1 and 4, and 1921 regulations, 65). When there is a limit it usually applies to all forms of holding taken together, *e.g.* deposit, loan, shares. But there is also quite another sense in which a limit may be applied, as to which reference is made to p. 216. Limits are construed excluding interest, unless it has been capitalised in account.[1]

Beneficial or Administrative.—Here there arises an important question, much the same as that with which we are so familiar in the case of bank deposit receipts in name of the deceased and another and the survivor. The following passage is quoted from Fuller on Friendly and Other Societies, 3rd ed., p. 117 :—

> There appears to be a presumption that a nominee is intended to take for his own benefit, unless he has by some anterior agreement intentionally put himself under a prior obligation : [2] and it is generally a question of evidence whether this is so or not, for the statutory provisions enable the society to pay to him, but do not confer on him an absolute title, and after he has received the money he may be ordered to refund to the executor : [3] though he may be entitled to retain sums he has expended for funeral expenses and the doctor's bill.[4] Where a testatrix, subsequent to the execution of her will, duly nominated the amount due to her by the post office savings bank at her decease in favour of one of her executors, and there was sufficient evidence to rebut the presumption that such executor should receive such amount as a gift, it was held that he received the same in his capacity of executor, and he was ordered to account for the same accordingly. [5]

It is pertinent to add here a reference to the Scots case of *Young* v. *Waterston*,[6] where, under somewhat special rules, a nomination of funds payable from a police mutual assurance association was held a good title to collect the money, but under obligation to pay it over to the executor under a later will. It would be very easy to add words showing that the nominee was to take beneficially, but it is officially stated that that cannot be allowed. It is quite common to find that the regulations applicable to different funds expressly save the claims of third parties against the payee.

Assignation v. *Nomination.*—There is neither principle nor authority to enable a gratuitous testamentary nomination to prevail in competition with an onerous irrevocable assignation ; none of the Acts contains anything to put these assets *extra commercium*. But National Savings Certificates are not transferable without official consent.

Post Office Savings Banks (Post Office Savings Bank Regulations, 1921, statutory rules, etc., 1921, No. 1532).

[1] *Griffiths* v. *Eccles Soc.*, [1911] 2 K.B. 275.

[2] *Lavin* v. *Howley*, [1897] 102 L.T. 560.

[3] *Biggs* v. *Lewis*, [1890] 89 L.T. 47.

[4] *Hughes* v. *Parry*, [1892] 93 L.T. 131.

[5] *Re Read*, [1896] 75 L.T.N.S. 295.

[6] 1918 S.C. 9.

Joint Accounts.—Regulations 60 and 61 provide for accounts in two or more names and survivors or survivor, and for changes in these names; also for adding a new name or names to a single name account, the new party or parties first signing a declaration.

Nominations.—The scheme is unusually elaborate. It applies to—

1. Balance on post office savings bank account;

2. Government stock on the Government stock register of the post office savings bank;

3. Government stock or securities inscribed or registered on the post office register of war issues; [1]

4. Amounts payable or returnable in right of an annuity purchased through the post office savings bank;

5. Any sum payable under a post office savings bank life assurance.

But not—

(*a*) National or War Savings Certificates (p. 215);

(*b*) Balance on a coupon deposit book.

The following is the substance of the scheme as contained in the 1921 regulations:—

65. Subject to the provisions of these regulations, a depositor of the age of sixteen years or upwards, may nominate any person to receive any sum due to such depositor at his decease, but a nominator may not have more than one nomination in force at any time, Provided that the postmaster-general may refuse to accept or register any nomination.

66. (1) Every nomination shall be in writing, and shall be signed by the nominator in the presence of a witness, and shall be sent by post or otherwise to the controller of the post office savings bank during the lifetime of the nominator.

(2) Every nomination shall be in the prescribed form which may be obtained from the controller of the post office savings bank.

67. A nomination shall be registered by the postmaster-general and returned to the nominator.

68. (1) A nomination shall be revoked by the death of the nominee in the lifetime of the nominator, or by the marriage of the nominator, or by written notice of revocation signed by the nominator in the presence of a witness (who must also sign the notice) and sent for registration in accordance with the provisions of this regulation, or by any subsequent nomination.

. . . . . .

(3) A nomination shall not be revoked by any will. . . .

. . . . . .

70. A nomination may be in favour of one person or of several persons (who shall be clearly designated in the nomination), and in the latter case may direct that specific sums shall be paid to one or more of the persons named in the nomination, or that the persons named in such nomination may take the property nominated in specified shares, or may give directions to both effects.

71. No person who witnesses the signature of a nominator to a nomination shall take any benefit under such nomination.

72. Subject to these regulations where the postmaster-general has no notice of the claim of any creditor of the nominator, the postmaster-general

[1] There are special regulations of 1922, but they are generally to the same effect as the 1921 regulations.

shall pay the persons named in any such nomination made by such nominator, and in force at his death, according to the directions of such nomination, notwithstanding the production of probate of the will of the deceased nominator or letters of administration to his estate, and the receipt of any person so named shall be a good discharge to the postmaster-general for the sum so paid, notwithstanding such person has not attained the age of twenty-one if such person has attained the age of sixteen.

73. Where, on the death of a nominator who has made a nomination, the postmaster-general has notice of a claim of any creditor against the estate of such nominator, and such estate, apart from the amount nominated, appears to be insufficient to satisfy such claim, the postmaster-general may, in his discretion, apply the amount nominated in or towards the satisfaction of such claim.

74. Where any person nominated to receive any sum is under the age of sixteen, and it is proved to the satisfaction of the postmaster-general that funds are urgently needed for the maintenance, education, or benefit of such infant, the postmaster-general may pay the sum mentioned in the nomination, or part, to any person who may satisfy the postmaster-general that he will apply such money for the benefit of such infant, and the receipt of such person shall be a good discharge to the postmaster-general for the amount so paid.

Then there follow the regulations adapting the scheme to Scotland, subject to regulation 80, which entitles the postmaster-general to assume domicile at the last place of residence. The following is pertinent here :—

93. (4) Where on the death of a depositor domiciled in Scotland, who has made a nomination, the postmaster-general has notice of a claim of any person entitled on the ground of *jus relictæ* or legitim to any part of the estate of such depositor and such estate, apart from the amount nominated, appears to be insufficient to satisfy such claim, the postmaster-general may apply the amount nominated in or towards the satisfaction of such claim, but subject as aforesaid, any payment made by the postmaster-general to the nominee (irrespective of the amount due to the depositor at his death), shall be a valid payment, and the receipt of the nominee shall be a good discharge to the postmaster-general for the sum so paid.

National (or War) Savings Certificates.—The 1919 regulations are almost identical with the post office savings bank regulations set out above. Prints of the regulations, forms of nominations, and all information can be obtained from the Controller, Money Orders Department (G.P.O.), Manor Gardens, Holloway, London, N. 7.

Note that these investments may be made in two or more names with survivorship.

Government Annuities Act, 1882 (45 & 46 Vict. c. 51, s. 6, as amended by 46 & 47 Vict. c. 47, s. 3).—Any person to whom an insurance under the 1882 Act is granted may nominate a person to whom the money due under it, not exceeding £100, is to be paid on the insured's death.

National Health Insurance Benefits (Statutory Rules and Regulations, 1918, No. 932, ss. 213 *et seq.*).—The rules apply to any benefit under the Act unpaid at death, and any other sum payable under the Act, without limit. The nomination must be sent to the insured's society in his life-

time. The nomination is to be " under his hand," but if he is unable to write it may be by mark attested by two witnesses. A nomination takes effect " notwithstanding the want of due execution, minority, marriage, or in Scotland the birth of a child." If the nominee is a child of the insured, and dies in the latter's lifetime, leaving issue who survive the insured, the nomination takes effect as if the nominee had died immediately *after* the insured unless a contrary intention appears. When there are two or more nominees, the money may be paid to one or more of them, excluding the others, " without prejudice to any remedy which such others may have for recovery of the sum so paid against the person or persons receiving that sum."

Deposit contributors are dealt with in special regulations of 1913 (Regulations No. 19, Scotland), but see National Health Insurance Act, 1918, s. 37 (2).

Friendly Societies (Friendly Societies Act, 1896, 59 & 60 Vict., s. 56).—A member of a society (other than a benevolent society or a working men's club), not being under sixteen, may by writing delivered to the society, in his lifetime, nominate a person to receive moneys at his credit, up to a limit of £100. This limit is clearly upon the sum which may be nominated, and has no reference to the amount at credit.[1] Thus, if there is £200 at credit at death, a nomination of £100 or less is valid; but in the same case a nomination which purported to be of the whole sum at credit would apparently not be good even to the extent of £100, nor would it apparently make any difference though at the date of the nomination the amount at credit had not exceeded £100. Marriage revokes the nomination.

Industrial and Provident Societies (Industrial and Provident Societies Act, 1893, 56 & 57 Vict. c. 39, s. 25).—A member, not under sixteen, may, by writing delivered to the society in his lifetime, nominate a person or persons to receive the money at his death, " provided the amount credited to him in the books of the society does not *then* exceed £100." This word " then " is held to refer, not to the death of the nominator, but to the date of the nomination.[2] From this it results that there is no limit on the amount which may be nominated, but only an arbitrary condition precedent to the validity of any nomination that at its date the amount excluding interest, at the nominator's credit, shall not exceed £100. If it is £101 a nomination of £50 would be bad, though there might be only £50 at credit at death.

Trade Unions (Trade Unions Act, 39 & 40 Vict. c. 22, s. 10, as amended by 46 & 47 Vict. c. 47, s. 3).—A member, not under sixteen, may, by nomination delivered to the union in his lifetime, nominate any person to whom any money payable on his death by the union, not exceeding £100, shall be paid. This indicates that the limit of amount is on the nomination, not on the fund at credit.

[1] Cf. *Griffiths* v. *Eccles Soc.*, [1911] 2 K.B. 275.

[2] *Griffiths* v. *Eccles Soc.*, *supra.*

II. Payment without Confirmation

Independently of any "nomination," there are numerous cases in which parties, entitled to receive certain moneys on death, are privileged to do so without requiring to produce confirmation. But many of these are limited to intestacy, and (with one exception) all of them are limited to sums not exceeding £100 from one source, though sometimes the sum so paid may be the balance of a larger sum, as explained below.

Life Policies: Domicile out of the United Kingdom.—When British life offices have granted policies on the lives of persons who die domiciled out of the United Kingdom, no confirmation or any other United Kingdom grant, whether by resealing or otherwise, is required as a title to uplift the money and give a good discharge. This is the one exception referred to in the preceding paragraph; there is no limit of amount. See p. 121.

It is understood that all the other cases which follow agree in this, that payment without confirmation cannot be compelled, the parties liable having an uncontrolled discretion to require or to dispense with confirmation.[1] If they elect to waive confirmation, and to pay to the persons entitled to the personal estate, the rule is that they must pay to all of those parties, and are not entitled to pick and choose,[2] unless they are expressly authorised to do so. Even where confirmation is called for, resealing is usually dispensed with, and this is stated without prejudice to the question whether, in many of those cases, resealing is necessary even on the strictest view.

Money belonging to a deceased depositor in the post office savings bank is payable to his representatives either on a Scottish or English title, without regard to the place or places where the money may have been deposited. Where the deceased depositor died in Paris domiciled in England, and the funds had been deposited at various places in England and Scotland, the whole was given up and confirmed as estate in Scotland, where the executor happened to be residing, and the title was accepted by the post office and the money was paid without question (*Martinette*, 22 Feb. 1879).

Now see Finance Act (No. 2), 1915, s. 48 (p. 126).

The Navy.—Confirmation of the estate of a deceased officer, seaman, or marine, is in practice waived when the naval assets do not exceed £100 (Navy and Marine (Property of Deceased) Act, 1865).

If after the disposal of such an estate in accordance with that Act, it happens that, in consequence of an award of prize money or prize bounty, there becomes payable to the estate a sum not exceeding £100, it may be disposed of by the Admiralty in accordance with that Act, without confirmation, even though the total naval assets thus exceed £100 (Naval Prize Act, 1918).

[1] *Escritt* v. *Todmorden Soc.*, [1896] 1 Q.B. 461.

[2] *Symington's Exrs.* v. *Galashiels Co.*, 1894, 21 R. 371.

Confirmation may also be, and in practice is, dispensed with in the case of persons who were employed in H.M. dockyards or naval establishments, or in the civil departments of the navy, or entitled to allowances from the compassionate fund, or any widow entitled to a pension on the establishment of the navy, when the sum does not exceed £100.

The Army (Regimental Debts Act, 1893).—On the death of a person subject to military law the military authorities inventory his effects in camp or quarters, and if the death occurs out of the United Kingdom the effects within the state, colony, or other area; the preferential charges are paid, namely, expenses of illness and funeral, any military debts, and, if death occurs out of the United Kingdom, servants' wages for two months and household expenses for one month, or since last pay, whichever is the shorter. Only the surplus is personal estate for death duty. If it does not exceed £100 it is to be paid to the deceased's representative (*i.e.* executor), whom failing, to the parties who are beneficially entitled to the deceased's personal estate.

The Secretary of State ascertains the total amount at the credit of the deceased, including arrears of pay, allowances, etc. He pays the same to the deceased's representative, whom failing, if the amount does not exceed £100, he may either require confirmation or he may pay to the persons appearing to be beneficially entitled to the deceased's personal estate.

Where gratuities under the various Superannuation Acts to the legal personal representatives of established or unestablished employees of the War Department exceed £100, representation is required; otherwise not.

The distribution of accrued pensions due to the estates of pensioners, including widows of officers and other ranks, is under the Pensions and Yeomanry Pay Act, 1884, which provides for dispensing with representation where the amount due from army funds does not exceed £100.

Post Office Savings Banks.—The 1921 regulations provide as follows:—

81. (1) Where the whole amount due to a depositor at his decease does not exceed £100, exclusive of interest, and probate of the will of such depositor is not, or letters of administration to his estate are not, produced within such time as the postmaster-general thinks reasonable, if such depositor has made no nomination, or so far as any nomination does not extend, the postmaster-general may, without requiring probate of the will or letters of administration to the estate of the deceased depositor, in his discretion pay or distribute the amount, or any part thereof, to or among the person or persons or any one or more of the persons (exclusively of the others) who shall in the opinion of the postmaster-general establish a valid claim to the amount or any part thereof under any of the following descriptions,—

(*a*) a person who has paid the funeral expenses;

(*b*) a creditor of the depositor;

(*c*) a person appearing to the postmaster-general to be beneficially entitled, according to the statutes of distribution or at common law or under any unproved will, codicil, or testamentary disposi-

tion, to the personal estate of the depositor or to any interest or interests therein or to any specific or general portion or portions thereof;

(*d*) a person entitled to take out probate or letters of administration to the depositor;

(*e*) a person undertaking to maintain any person who by reason of incapacity (including minority) is unable to give the postmaster-general a legal discharge;

(*f*) in the case of foreign seamen, the consular authority of any country with whom a treaty has been made relative to the payment of moneys due to such seamen;

(*g*) in the case of foreign subjects, including foreign seamen in cases in which the preceding paragraph is not applicable, the consular authority of the country to which the depositor belongs, or such other consular authority as may appear to the postmaster-general to be appropriate, on such assurance as to the ultimate disposition of the deposits as is satisfactory to the postmaster-general;

(*h*) in the case of British subjects whose relatives reside outside the British Islands, such officer or authority as shall appear to the postmaster-general to be suitable to dispose of the deposits in accordance with the appropriate law.

. . . . . .

(2) In making payment, the postmaster-general shall have regard to the rules of law regulating the distribution of the estates of deceased persons, but he may, nevertheless, when he considers that injustice, hardship, or inconvenience would result from adherence to such rules, pay and distribute the amount due to the deceased depositor otherwise than in accordance with such rules.

(3) The receipt of any person to whom payment may be made under this regulation shall be a good discharge to the postmaster-general for the sum paid, and any such receipt may be signed by any such person above the age of sixteen, notwithstanding that such person has not attained the age of twenty-one.

(4) In this regulation the expression "statutes of distribution" includes any Act or Acts of Parliament relating to the distribution of the personal estates of persons dying wholly or partially intestate.

The above regulation is adapted to Scotland (under reference to regulation 80, which entitles the postmaster-general to assume domicile at the last place of residence), as follows:—

93. (1) Expressions referring to the persons beneficially entitled to the personal estate of a deceased depositor according to the statutes of distribution, shall, in the case of a depositor domiciled at the date of death in Scotland, be deemed to refer to the persons entitled to share in the distribution of the moveable or personal estate of such depositor according to the law of Scotland.

. . . . . .

(3) Expressions referring to the probate of the will or to letters of administration to the estate and effects of a deceased depositor shall, in the case of a depositor domiciled in Scotland, be deemed to refer to confirmation of executors according to the law of Scotland.

It will be observed that under these post office regulations—

1. Not only can no more than £100 (and interest) be paid without

confirmation, but nothing at all can be so paid if the amount at credit at death exceeds £100, and interest.

2. Cases testate as well as intestate are covered.

3. There is no power to compel payment without confirmation.

4. Even within s. 81 (1) the power of the postmaster-general is extremely wide and arbitrary. No doubt it refers to persons who establish a valid claim, but assuming two such claimants legally entitled to the estate equally between them, it clearly entitles the postmaster-general to pay the whole to one of them. Section 81 (2) goes even further, for it entitles the postmaster-general to go outside the class of legal claimants. It is hardly necessary to consider whether these powers extend to testate cases, for they can be excluded by confirmation, which indeed applies to intestate cases also.

5. If there is a partial nomination, this regulation 81 applies to the surplus not nominated, but all within the £100 limit.

6. Assuming those powers to be exercised otherwise than in accordance with the ordinary rules of succession, is that final, not only between the bank and the representatives, but also among the latter *inter se* ? If the post office funds were the whole estate it appears that it would be so, but in the event of other estate existing it may be that a right of equalisation would arise.

National (or War) Savings Certificates.—The 1919 regulations are very similar to the post office savings bank regulations printed above. It is officially stated that if at the death of the holder the value of the certificates in respect of which a nomination has not been made does not exceed £100, confirmation is not required.

United Kingdom Government Stock (Finance Act, 1918, s. 38).—This applies to any Government stock, issued in connection with loans for the Great War, standing in the name of a person whom the Bank of England has reason to believe is dead :—

1. If the amount does not exceed £100 it may be transferred by the bank to the post office stock register, and any dividend accrued thereon may be remitted to the postmaster-general.

2. If the bank has reason to believe that the death occurred in actual military service, and that the deceased was resident in the overseas dominions, then, up to £500 of stock, the bank may hold it at the disposal of the high commissioner or agent in London of the dominion in question, who, after providing for United Kingdom death duties, may transfer the stock or pay the proceeds of sale to any person who in his opinion establishes a valid claim to it.

Funds in English Courts.—Under the rules of the High Court of Justice in England, on the death, intestate, of any person entitled to payment out of a fund in court, if his whole (net) estate, including his interest in the fund in court, does not exceed £100, the money may be paid out to the person who, being widower, widow, child, father, mother, brother,

or sister, would be entitled to take out administration, *i.e.* to be decerned and confirmed as executor-dative (Rules 1905, 62).

Any Public Department (50 & 51 Vict. c. 67, s. 8).—Whether the deceased died testate or intestate, any sum not exceeding £100 in respect of civil pay, superannuation, or other allowance, annuity, or gratuity, may be paid without confirmation.

Mercantile Marine (Merchant Shipping Act, 1894, ss. 176–8).—Wages and property of any merchant seaman or apprentice, not exceeding £100, may be paid by the board of trade to the persons who appear to be entitled to same, without confirmation. The board has power in the first place to pay the deceased's debts, and the £100 limit is then applied to the free balance.

Other £100 Cases.—1. Friendly Societies.—If the deceased died intestate, and without making a nomination (59 & 60 Vict. c. 25, s. 58).

2. Industrial and Provident Societies. The same (56 & 57 Vict. c. 39, s. 27).

3. Trade Unions.—The like (39 & 40 Vict. c. 22, s. 10, as amended by 46 & 47 Vict. c. 47, s. 3).

4. School Teachers' Superannuation—

(1) *England.*—Any sum in respect of superannuation allowance or gratuity, whether testate or intestate (8 & 9 Geo. V. c. 55, s. 8).

(2) *Scotland.*—Under the rules made by the Scottish Education Department, dated 16 August 1920, confirmation is to be dispensed with only when the total estate does not exceed £100.

£50 Limit.—1. Building Societies.—Amount due to any member or depositor who dies intestate (37 & 38 Vict. c. 42, s. 29).

2. Loan Societies.—The like (3 & 4 Vict. c. 110, s. 11).

National Health Insurance.—Any sum payable on death, whether testate or intestate.—There is no limit (Statutory Rules and Regulations, 1918, No. 932, s. 215, *et seq.*).

III. Death Duty Relief

1. When the net estate, heritable and moveable, subject to aggregation, does not exceed £100, no estate duty is charged, no matter how great the gross estate may be.

2. The like as to legacy and succession duties (Hanson, 567).

3. Under reference to the preceding part of this chapter, various sums not exceeding £100 are exceptionally treated as estates by themselves (Hanson, 172). That means that they are not aggregated. In this way it might appear that several sums of £100 might escape duty, but, in the words of an official reply, this is " not necessarily " so. On the contrary several of the Acts which are cited in the earlier part of this chapter contain express provision for the payers concerning themselves with the

matter of death duty. Thus there is a special official form No. 20 for use in cases where the deceased had money in any savings bank, or friendly or industrial and provident society, and exemption from estate, legacy, and succession duty is claimed on the ground that "the estate" is under £100 in net value. This form sets out in brief detail the whole estate, heritable and moveable, and the debts and funeral expenses. The form can be presented personally or sent by post to the registrar, estate duty office, Edinburgh, and if satisfactory a certificate will be given to enable the moneys to be paid over without production of any receipt for duty. This shows that not every sum not exceeding £100, even payable by the bodies referred to above, is an estate by itself so as to escape duty if the whole net estate exceeds £100, but the note in Hanson cited above is useful to keep in view in certain cases.

4. Further, when these small sums are treated as estates by themselves, and so exempt from estate duty, the exemption is extended to legacy and succession duties also (Hanson, 567).

5. All legacy and succession duties are excluded in the case of small estates not exceeding £500 *gross* (as calculated and subject as stated in Chapter XIII.) on which the fixed duty of £1, 10s. or £2, 10s. on the *ad val.* estate duty has been paid.

6. All legacy and succession duties are excluded in the case of estates not exceeding £1000 *net* (calculated and subject as stated in Chapter XIII.).

It is hardly necessary to point out that these exemptions from legacy and succession duties depend on the values as fixed for estate duty, and are not imperilled by the fact that, after the death and before division, the assets have greatly increased in value. Nay, even a *nil* or *minus* value (pp. 148, 150) for estate duty will frank the asset for legacy and succession duties. Sometimes very striking results appear in this way.

7. *Common Seamen, Marines, Soldiers, and Airmen.*—These enjoy complete immunity from estate duty. This rests upon their exemption from probate duty under 55 Geo. III. c. 184, Sch. Part III.; the 1894 Act, s. 8 (1); and airmen are introduced by the Air Force Constitution Act, 1917, and Orders thereunder.

The exemption is controlled by the word "common." In the navy it includes petty officers, non-commissioned officers, and all men forming part of the complement of a vessel, but not a commissioned, warrant, or subordinate officer or assistant engineer. Thus a sergeant of marines and an engine-room artificer are included, but not a master gunner. In the army the exemption applies to the ordinary rank and file, and thus includes a corporal and a lance-sergeant, but not a sergeant.

The exemption is not conditioned by death in action or from wounds or on active service, as to which see p. 168.

There is no limit of amount; see p. 210.

The exemption does not extend to legacy or succession duty, but with reference to these duties the estates in question are treated as if estate duty had been paid. In this way the general exemptions from

legacy and succession duties in the case of " small " estates (No. 5 and 6 above) are not lost.

As regards estate duty the exemption is very complete. (1) Of course it covers the actual estates of the persons in question. (2) In testate cases it covers all " passings " under their wills, *e.g.* on the deaths of successive liferenters. (3) This should cover passing on the expiry of the widow's terce, whether the case is one of testacy or intestacy. (4) If the deceased sailor, etc., was himself a liferenter under the will of some other person, is the passing of the liferented estate on the sailor's death exempt from estate duty ? In Hanson (171) it is stated " it is conceived that this exemption will extend, not only to the property of the deceased in respect of which probate is granted, but to all property passing on his death." But it is known that the official view is that this is either wrong or is too broadly stated.

CHAPTER XXI

RECORDS—EXTRACTS—CALENDARS

Records.—The earlier records of all the commissary courts in Scotland are now deposited in the General Register House, Edinburgh, those of the old inferior commissary courts down to the abolition of these courts in 1823, and those of the commissary court of Edinburgh down to the year 1830, when its ordinary jurisdiction was restricted to the county of Edinburgh. The commissary court books were at one time a competent record for all deeds with a clause of registration, and for probative writs registered under the Act of 1698, and also for protested bills and promissory notes under the Act of 1681. By an Act of 1809 (49 Geo. III. c. 42, s. 2), the recording of all such writs in the commissary courts after the expiration of six months from the passing of the Act was declared unlawful. The proper commissary records relating to the confirmation of executors originally consisted of (1) a register of decrees-dative, and (2) a register of testaments or confirmations, both testamentary and dative. There was no separate register of inventories and testamentary writs previous to 1804, these documents having been recorded only along with the confirmation in which, according to the forms then in use, both were engrossed ; but by an Act passed in that year (44 Geo. III. c. 98, s. 23) it became necessary to record inventories and relative testamentary writs, whether confirmation was required or not. Accordingly a special register was then instituted in which were recorded all inventories and writs exhibited under that Act, relating to the estates of persons dying previous to 10 October 1808. A new register of inventories and testamentary writs, relating to the estates of persons dying after 10 October 1808, was begun under the Act of that year (48 Geo. III. c. 149, s. 38), and has been carried on continuously to the present time. Though for convenience the inventories and writs are now kept in separate series of volumes, they constitute one register, and it is incompetent to record any testamentary writing except as an adjunct to an inventory.

Notwithstanding the amalgamation of the commissary with the sheriff courts in 1876, the records of the commissariot are still distinct from those of the county or sheriffdom. Inventories and relative testamentary writings are not recorded in the ordinary sheriff-court books, but in the register of inventories and writs instituted as above mentioned, and they are (in Edinburgh) described in the confirmation as being recorded, not in the sheriff-court books, but in the court books of the com-

missariot. To describe them as recorded in the sheriff-court books would be incorrect and misleading. A deed recorded in the sheriff-court books is registered for preservation, and is retained in the custody of the court, an extract only being given out. Inventories and relative writs are recorded for revenue purposes and as the grounds upon which confirmation may be issued, and after they have been recorded they are delivered up, the former to the stamp-office and the latter to the ingiver.

Classes of Documents.—The following classes of documents are preserved in the commissary offices:—

1. Initial writs for appointment as executors-dative and various other applications to the sheriff in commissary matters as explained in other chapters of this book.
2. Printed abstracts of initial writs for appointment of executors-dative as published by the keeper of the record of edictal citations.
3. Decrees-dative and other decrees and deliverances.
4. Copies of inventories of personal estate.
5. Bonds of caution.
6. Copies of confirmations.
7. Copies of testamentary writings.

And, in addition, in the commissary office, Edinburgh.

8. Copies of probates (including the will), letters of administration, and letters of administration with the will annexed, granted in England or Ireland, which have been resealed in Scotland under the 1858 Act.
9. Copies of documents sealed in Scotland under the Colonial Probates Act, 1892, and copies of inventories of personal estates recorded under that Act.
10. Similar papers with reference to Irish grants resealed in Scotland under the new regime.
11. The original wills of soldiers of Scottish domicile, whose estates have been administered without confirmation or probate under the Regimental Debts Act (formerly 1863, now), 1893.

All these documents may be examined and copied by the public. Note that no mention is here made of the schedule of debts and funeral expenses, which is a private document, and is not available to the public.

Extracts or Copies, as the case may be, of any of the above documents, will be supplied by the clerk of court on payment of the appropriate fees. Proper extracts signed by the clerk of court, and sealed with the seal of the commissariot, are made and issued—of any decree-dative; of a confirmation, either with or without inventory; of an inventory and relative testamentary writings; of an inventory alone; or of testamentary writings alone. Extracts of testamentary writings from these records, however, are not regarded as having the same effect as extracts from a register of probative writs, but only as certified or authenticated copies.[1] In extracting testamentary writings alone they are always described in the preamble as having been exhibited along with an

[1] Public Records (Scotland) Act, 1809, ss. 2, 3.

inventory of the personal estate, and the whole writings are included in the extract as together constituting the will. Extracts are required chiefly for the purpose of instructing in a Dominion or foreign court the executor's title to administer the deceased's estate. For this purpose an extract of the confirmation without including therein the inventory confirmed, accompanied in testate cases by an extract of the testamentary writings recorded with the inventory, is generally found to be sufficient. Extracts, besides being signed by the clerk and sealed, may, when required, bear a certificate by the sheriff, for which the following is a form :—

I, A. B., Esquire, sheriff[-substitute] of the sheriffdom of the Lothians and Peebles, which includes within its jurisdiction the commissariot of the county of Edinburgh, hereby certify that C. D., whose signature appears to the foregoing extract, is commissary clerk [depute] of the said commissariot, that the seal thereunto annexed is the seal of the said commissariot, and that the said extract is duly authenticated according to the law and practice of Scotland.—Signed by me at Edinburgh and the seal of the said commissariot affixed this day of 19 .

[*Signature and Seal.*]

When the document is to be used in a foreign court or country it should be authenticated by a consul of that country.

Calendar.—A printed calendar, alphabetically arranged, of all confirmations granted in Scotland, and of inventories recorded of which no confirmation has been required, is prepared annually by the commissary clerk of Edinburgh from returns furnished to him quarterly by the clerks of all the other commissariots. The calendar was instituted by the Sheriff Courts Act, 1876, and commences with that year. It gives the name and designation of the deceased, the place and date of death, the names and designations of the executors, the date of confirmation or of recording the inventory, the date of the will if any, and where and when the same was recorded, and the value of the estate. Copies of the calendar are deposited for public inspection in every place in Scotland from which confirmations are issued (p. 1), in the General Register House in Edinburgh, and in the probate courts of London and Dublin.

Calendars containing similar particulars of all probates and letters of administration issued in England and Ireland are prepared in those countries; they go back to 1858. Copies are deposited in the commissary office, Edinburgh.

Searches for any documents which may be recorded or deposited in the commissary office are made when required. The documents, if found, may be inspected and copied without charge beyond the fees of search.

CHAPTER XXII

JUDICIAL PROCEEDINGS

Although all confirmations proceed in name of the sheriff, there is in the great majority of cases no special reference to the judge, the proceedings being conducted in the office of the clerk of court, whose duties correspond to those of the registrars in the probate courts in England and Ireland.

The direct intervention of the judge is necessary only in the following applications:—(1) for appointment, or recall of appointment, of an executor-dative; (2) for restriction of caution; (3) for special warrant to issue confirmation, where a caveat has been entered and objections lodged, or where there is any specialty or cause of doubt in respect of which the clerk of court declines to proceed without the authority of the court; (4) for warrant to seal or examine the repositories of a deceased; and (5) for commissions to take oath or to take evidence. In most of those applications there is no defender or respondent; but they are not therefore granted as matter of course. Each is considered on its merits, and notwithstanding the absence of any contradictor, or the failure of opposition either on the merits or for lack of title in the objector, the sheriff may *ex proprio motu* refuse the application if he considers there is proper ground for doing so.

Initial writs are submitted in the first instance to the sheriff substitute, whose judgment can always be appealed against to the sheriff and then to the court of session, or direct to that court, and finally to the House of Lords. The procedure in appeals is the same as in ordinary sheriff court cases, with this exception, that in the event of the court of session coming to a decision which requires an appointment or confirmation of an executor other than the executor appointed or confirmed by the sheriff, or when the sheriff has refused to appoint or confirm, while the court recalls any appointment or confirmation made or granted by the sheriff, they do not themselves appoint or confirm, but remit to the sheriff with directions.[1]

Form and Procedure.—These are, as far as possible, the same as in ordinary actions in the sheriff court. The form of petition for appointment of executor prescribed by the Confirmation and Probate Act, 1858, and the forms of other petitions in commissary cases in use previous to the Sheriff Courts Act, 1876, have in practice been superseded by the latter Act, and subsequent sheriff court Acts.

[1] Erskine, 1. 2. 6; 1. 5. 28. *Denman* v. *Torry*, 1899, 1 F. 881.

The procedure in applications for the appointment of executors has already been partly explained (pp. 81–83). The intimation and *inducice* are still regulated by the 1858 Act.

On the first court day after the expiry of the *inducice* the writ is enrolled by the clerk, and called in court, when the pursuer or his agent moves for decree. All initial writs and productions are examined in the clerk's office previous to the calling. If these are in form, and if the crave is in accordance with practice, decree is granted. If there is anything special in the application, it is brought under the notice of the judge, who, before deciding on the merits, may call for explanations, and may require alterations on the writ, or amendments by minute, as he may consider necessary.

Contentious Proceedings.—Where appearance is entered by anyone who intends to compete for the office, or to apply to be conjoined, he also lodges a writ, if he has not done so already, and nothing is done until the expiry of the *inducice* in the later writ, when both applications are enrolled and considered together. If the question is simply one of law, the sheriff may conjoin the processes, hear the parties, and decide the case; or he may appoint a diet of debate, and thereafter pronounce judgment. Where facts are in dispute, the practice is to allow a record to be made up in one of the applications, and the case proceeds in the same manner as an ordinary sheriff court action, except that the term "answers" is used instead of "defences," and the term "respondent" instead of "defender." The other initial writ is continued until the question has been decided, when both writs are disposed of together. Where the objector does not compete for the appointment, but simply opposes the pursuer's application, he must lodge answers before the expiry of the *inducice*.

Where an executor has been decerned but not confirmed, and a writ is presented to recall the decerniture, and to conjoin or substitute the new pursuer, special intimation must be made to the executor, who, if he wishes to oppose the application, must enter appearance at the calling, when the case will be decided, or further procedure ordered, as in a first application for appointment. An application of this kind is competent, without a reduction, even after the original decerniture has been extracted, but before confirmation [1] [Form 57].

Restriction of Caution.—See Chapter XIV.

Special Warrant for Confirmation.—In a case of confirmation of executor-nominate, although no caveat or objections have been lodged, a writ for special warrant may still be necessary where there is any irregularity in the terms or execution of appointment of executors; where the declinature or acceptance of any executor has not been ascertained and it is necessary to proceed with the confirmation; or where there is any substantial informality in the inventory or oath. In these cases there is no respondent, unless it should appear to the sheriff that intima-

[1] *Webster* v. *Shiress*, 1878, 6 R. 102.

tion ought to be made to some person interested, such as the next of kin when the validity of the will is in question (*Russell*, 30 Nov. 1871). When intimation is made and appearance entered, the procedure is the same as where a caveat has been lodged. But where no intimation is made, or, if made, where no appearance is entered, the sheriff either grants the prayer of the writ at once, or, where it seems necessary, he may order a proof before answer, or he may appoint the party to be heard before giving judgment [FORMS 1–10].

Warrants to inventory, secure, etc.—Applications for warrant to examine and seal a deceased's repositories, to inspect his papers, and to secure his effects, until it should appear who was entitled to take charge of his affairs, were, though not very frequent, competent in the commissary court, and may still be entertained by the sheriff. The application may be presented by any person interested in the estate, such as a next of kin or creditor, or by any one who, though having access to, and, it may be, possession of, the repositories of the deceased, desires to be relieved of the responsibility of intermeddling with the deceased's papers or valuables while the amount or disposition of his property is unknown. The whole circumstances under which the interference of the court is considered necessary must be fully set out; and, before granting it, intimation may be ordered. Where a petition for the appointment of an executor to the deceased had been presented, service was ordered on the party who had presented it (*Thick*, 15 Oct. 1867). The warrant, if granted, is in favour of the clerk of court and his assistants, and is executed by them, it may be in presence of the parties interested. Any will, as well as any money, documents of debt, or articles of value, are taken possession of and removed for safe custody to the office of the commissary clerk, the repositories are sealed, and the premises secured, and a report of the proceedings is made to the sheriff and lodged in process. Should any will have been discovered containing a nomination of executors, the executors may obtain delivery of it and any property in the custody of the commissary clerk, on an order from the court, which may be applied for by minute in the process. Where a will was found naming four executors, three of them, being a majority, were held entitled to delivery of the will, though the fourth, who had been with the deceased when he died abroad, had written to request that nothing should be done till his return (*Littlejohn*, April 1861). Where a holograph writing naming a residuary legatee, but not appointing an executor, was found, and the next of kin were afterwards decerned, warrant was granted to the clerk of court to record the writing in the books of council and session, and to deliver an extract to the executors (*Macdonald*, 6 June 1865). If no appointment of executors is discovered, the whole effects remain in the custody of the clerk of court until an executor-dative has been appointed, who, on his decerniture, obtains access to them to enable the inventory to be prepared; and after confirmation has been obtained, they are delivered to him. Property in the custody of the clerk was delivered to the *curator bonis* of a general legatee who had been decerned

but not confirmed (*Shand*, 9 June 1870). Where the effects were of very trifling value, authority was granted to deliver them to the agent of the next of kin even before decerniture (*Macpherson*, 30 June 1880). After an executor had been confirmed, it was held incompetent for the commissary to grant warrant to inventory and preserve effects alleged to have belonged to the deceased and claimed by his executor, but whose right thereto was denied by the parties who were in possession of the effects.[1] But it has been held competent to grant warrant at the instance of an executor decerned but not confirmed to examine repositories and make up an inventory of effects, access to which had been refused by the person in whose custody they had been left by the deceased (*Mather*, 6 Nov. 1864), and for this purpose to break open lockfast places alleged to contain property of the deceased (*Balgarnie*, 4 March 1866).

Caveats.—A caveat may be lodged against any application being received without notice to the person by whom or on whose behalf the caveat is lodged. A caveat does not of itself bar any proceeding. When the application referred to in the caveat is presented, intimation is given to the party by whom the caveat has been lodged, who must immediately, where the caveat is against the issue of confirmation, lodge a note of his objections. Intimation is then made to the applicant that, in respect of objections having been lodged, confirmation can be proceeded with only under the authority of the sheriff. Unless the objector can be satisfied, a writ must be presented answering the objections and praying for authority to the clerk to issue confirmation; and the sheriff may appoint parties to be heard, and thereafter decide, or he may order intimation to the objector, and ordain him to answer the writ as respondent, and the case then proceeds as an ordinary sheriff court action. Where the caveat is directed against the appointment of an executor-dative, the party who has lodged the caveat receives intimation of the presentation of the writ for appointment, and he must thereto enter appearance and lodge answers or a competing writ. If the caveat is against restriction of caution, objections must be lodged when the application is intimated.

[1] *Milligan* v. *Milligan*, 1827, 5 S. 206.

CHAPTER XXIII

OFFICIAL FEES

THE following is the new scale. It is held to apply to all cases, including "small estates."

1. Petition for appointment of executor, including extract .	£ 0	10	0
2. Petition for restriction of caution or for special warrant	0	10	0
3. Receiving and examining inventory of personal estate —covering all proceedings, including recording testamentary writings, and correspondence, but not petitions for appointment of executor, for restriction of caution, or for special warrants—			
a. When the gross amount of the estate **belonging beneficially to the deceased of which confirmation is required**—			
(1) Does not exceed £1000—For each £50 or part thereof	0	4	0
(2) Exceeds £1000 but does not exceed £5000—For the first £1000	4	0	0
and for each £500 or part of £500 thereafter .	0	15	0
(3) Exceeds £5000 but does not exceed £10,000— For the first £5000	10	0	0
and for each £500 or part of £500 thereafter .	0	10	0
(4) Exceeds £10,000—For the first £10,000 .	15	0	0
and for each £500 or part of £500 thereafter .	0	5	0
(with a maximum fee of £100).			
b. Additional and corrective inventories and eiks shall be charged at the above rates **on the additional estate belonging beneficially to the deceased,** of which confirmation is required.			
c. Corrective inventories, which make no addition to the total amount of moveable estate disclosed in the original inventory, and also inventories of estate *ad non executa*, shall be charged only .	0	4	0
d. Where it is declared that confirmation is not required, fees at half the *ad valorem* rate shall be charged on receiving the inventory. If confirmation should subsequently be required, the remaining half of the fees shall then be charged.			

4. Extracting or copying, per sheet	£0	2	0
5. Single search, to include inspection—			
Within five years from date of search	0	1	0
Beyond five years from date of search	0	3	0
6. Certifying English, Irish, or Colonial probates or letters of administration—			
Gross estate sworn not to exceed £500	0	2	0
Gross estate sworn not to exceed £3000	0	10	0
Gross estate exceeding £3000	1	0	0

NOTE.—The following table applies the fees under head No. 3.

Estate not exceeding[1] £	Fee. £	*s.*	*d.*	Estate not exceeding £	Fee. £	*s.*	*d.*
50	0	4	0	1,000	4	0	0
100	0	8	0	1,500	4	15	0
150	0	12	0	2,000	5	10	0
200	0	16	0	2,500	6	5	0
250	1	0	0	3,000	7	0	0
300	1	4	0	3,500	7	15	0
350	1	8	0	4,000	8	10	0
400	1	12	0	4,500	9	5	0
450	1	16	0	5,000	10	0	0
500	2	0	0	5,500	10	10	0
550	2	4	0	6,000	11	0	0
600	2	8	0	6,500	11	10	0
650	2	12	0	7,000	12	0	0
700	2	16	0	7,500	12	10	0
750	3	0	0	8,000	13	0	0
800	3	4	0	8,500	13	10	0
850	3	8	0	9,000	14	0	0
900	3	12	0	9,500	14	10	0
950	3	16	0	10,000	15	0	0

Exceeding £10,000, the charge rises 5s. for each £500 or part thereof, and the following are selected instances :—

Estate not exceeding[1] £	Fee. £	*s.*	*d.*	Estate not exceeding £	Fee. £	*s.*	*d.*
15,000	17	10	0	90,000	55	0	0
20,000	20	0	0	100,000	60	0	0
25,000	22	10	0	110,000	65	0	0
30,000	25	0	0	120,000	70	0	0
35,000	27	10	0	130,000	75	0	0
40,000	30	0	0	140,000	80	0	0
45,000	32	10	0	150,000	85	0	0
50,000	35	0	0	160,000	90	0	0
60,000	40	0	0	170,000	95	0	0
70,000	45	0	0	Exceeding £179,500, the maximum fee of	100	0	0
80,000	50	0	0				

[1] *I.e.* gross estate belonging beneficially to the deceased and of which confirmation is required ; if not required, one half meantime.

APPENDIX OF FORMS

1. INITIAL WRIT for Special Authority to Issue Confirmation—Holograph Will with Informalities.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A., B., and C. [*design*],—Pursuers;

The above-named pursuers crave the court,—

To grant warrant to the commissary clerk to issue confirmation in favour of the pursuers as executors-nominate of the deceased D. [*design*].

[*Signed by Pursuers or their Law Agent, who adds his professional designation, business address, and "Pursuers' Law Agent."*]

Condescendence.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. The said D. left a will dated , which bears to have been executed in presence of two witnesses, but it contains a number of deletions and interlineations which are not authenticated by reference to them in the testing clause. In particular, the names of E., F., and G., as the names of his executors, are deleted, and the names of the pursuers are interlined above them. The said E., F., and G. have no interest in the deceased's succession, and have declined to claim the office of executor. The whole of the will, including the deletions and interlineations referred to, is in the handwriting of the said D. [*or otherwise*].

3. The pursuers have prepared an inventory of the personal estate of the said D., with relative oath, which [*or*, a draft of which] they now produce along with the will [*or*, an extract of the will].

Plea in Law.

The pursuers, being executors nominated by the said D., are in the circumstances averred entitled to confirmation as such.

[*Signed here again as above.*]

2. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—NOMINATION OF EXECUTORS NOT EXPRESS.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. By his will, dated , the said D. instructed the pursuers "to pay my debts," and "to carry out my wishes as to the disposal of my property" as set out in the said will, but he failed to make an express nomination of executors or trustees. The terms used by the said D., and the whole tenor of his will, however, evidence his intention that the pursuers should act as his executors.

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3. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—EXECUTORS NOT NAMED.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. left a will dated , in which he appointed his "only sister and her children" to be his executors and universal legatories. The only sister of the said D. was E. [*design*], who predeceased him, and the pursuers are all her children.

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4. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—SUBSTITUTE DISPONEES, &C., NOT NAMED.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. By will dated the said D. disponed and assigned his whole estate [*or*, his whole personal estate; *or*, the residue of his personal estate] to E. [*design*], "his heirs and assignees" [*or* "his executors and representatives whomsoever"]. The said E. predeceased the said D., and the pursuers are all his children and next of kin, and as such his heirs *in mobilibus* [*or*, the pursuers are the executors-nominate of the said E. under his will dated]. The pursuers are thus the substitute general disponees [*or*, universal legatories; residuary legatees], and as such executors-nominate of the said D. [conform to writs produced].

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5. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—EXECUTORS NOT DESIGNED.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. by his will dated , named [*names*] to be his executors, but he did not design the persons named, or describe them so as to identify them or to distinguish them from other persons of the same names. The pursuers are the persons whom the said D. intended to appoint. They were, and had been for many years, intimate friends of the said D., and there were no other persons of the same names among his acquaintances.

6. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—EXECUTORS WRONGLY NAMED OR DESIGNED.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. by his will dated , appointed the pursuers to be his executors, but in the will the pursuer A. was wrongly named [*quote*], and the pursuer B. was wrongly designed [*quote*]. [*Explain discrepancies, and state reasons for holding that the pursuers are the persons intended to be named.*]

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7. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—EXCLUDING EXECUTOR ABROAD.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. by his will dated , appointed the pursuers, along with E., to be his executors. The said E. is now resident in [India], and it has not yet been ascertained whether he will accept or decline office as there has not been time to communicate with him. To delay confirmation until an answer from him can be obtained would be injurious to the estate. He has no beneficial interest in the succession of the said D. [*or state extent of his interest*]. As the acting of the said E. as a trustee and executor, while resident abroad, would impede the execution of the trust,[1] the pursuers, who are sufficient in number to carry out its purposes in the meantime, have advised the said E. to decline, under their obligation to assume him should he desire it on his return to this country [*or according to circumstances*].

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8. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—EXECUTOR NOT FOUND.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. by his will dated , appointed the pursuers, along with E. [*design*], to be his executors. The said E. left this country some years ago, intending to go to [Australia], but no communication has ever been received from him by his friends here, and his present address cannot be ascertained [*mention briefly attempts to ascertain it*]. He has no beneficial interest in the deceased's estate [*or state extent of his interest*]. The pursuers are a majority of the executors named by the deceased [*or as the case may be*]. The estate requires to be immediately realised and distributed for the benefit of those to whom the deceased has bequeathed it.

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9. INITIAL WRIT FOR AUTHORITY TO ISSUE CONFIRMATION—OBJECTIONS LODGED.

[*As No.* **1**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. by his will dated , appointed the pursuers to be his executors. They have applied for confirmation in ordinary

[1] This is still true although a majority of executors is a quorum.

manner, but they have received intimation from the commissary clerk that confirmation cannot be issued without the special authority of the court, in respect that objections have been lodged by E. [*design*]. [*Further averments to meet the objections articulately and specifically.*]

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10. INITIAL WRIT FOR SPECIAL AUTHORITY TO ISSUE CONFIRMATION—PROOF OF EXECUTION REQUIRED.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. and B. [*design*],—Pursuers;

The above-named pursuers crave the court,—

To allow proof of the due execution of the will dated , left by the deceased D. [*design*], and thereafter to grant warrant to the commissary clerk to issue confirmation in favour of the pursuers as executors-nominate of the said D.

CONDESCENDENCE.

1. The said D. died at on . He had at the time of his death his ordinary or principal domicile in the county of .

2. The said D. left a will dated . It is subscribed by him, and bears to be attested by two witnesses subscribing. He thereby appointed the pursuers to be his executors. The subscribing witnesses were [*full names and designations*], and the subscriptions to the will are the genuine subscriptions of the testator and of the said witnesses; but the designations of the witnesses are not contained in the testing clause thereof, nor appended to their signatures. The will having been registered in the books of council and session on [*date*], the designations of the witnesses cannot now be added. In respect of this informality of execution, and of the registration as above averred, it has become necessary, before confirmation can be expede, to apply to the court in terms of the 39th section of the Conveyancing (Scotland) Act, 1874, in order to prove the due execution of the will.

3. [*As in No.* **1**.]

PLEA IN LAW.

The pursuers, being executors nominated by the said D., are entitled to the allowance of proof craved, and thereafter to be confirmed as executors foresaid.

[*Sign twice as in No.* 1.]

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11. AFFIDAVIT OF WILL BEING HOLOGRAPH.

At the day of 19 .
In presence of one of His Majesty's justices of the peace for

Compeared A. and B. [*design*], who, being solemnly sworn and examined, depone,—That they are well acquainted with the handwriting and signature of the deceased D. [*design*]. They have seen and examined the

foregoing will [*or* codicil; *or* will of which the foregoing is an extract; *or* referred to in the foregoing initial writ]. To the best of their knowledge and belief the same is entirely [*or as the case may be*] in the proper handwriting of the said D., and is signed by him. All which is truth, as the deponents shall answer to God.

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12. AFFIDAVIT OF EXECUTION OF ENGLISH WILL.

I, A. B. [*design*], make oath and say that I am one of the subscribing witnesses to the will [*or* codicil] of C. D. [*design*] hereunto annexed, bearing date , and that the said testator executed the said will [*or* codicil] on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon, in the presence of me and of E. F. [*design*], the other subscribing witness thereto, I and the said E. F. both being present at the same time, and we thereupon at the request of the testator attested and subscribed the said will [*or* codicil] in the presence of the testator and of each other.

A. B.

Sworn at on
before me.

J.P. for or commissioner.

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13. AFFIDAVIT OR CERTIFICATE OF FOREIGN LAW.

I [*Judge, registrar, notary public, or other qualified person*], depone and certify as follows:—

1. I am [*state qualification*]. I am well acquainted with the laws of [*foreign State*].

1. *Intestacy.*

2. The deceased D. [*design*] having died intestate, domiciled in , by the said laws the persons entitled to succeed beneficially to his personal estate and to administer the same are his widow and children [*or* his widow as guardian of her children, *or* father, *or* mother, *or* next of kin].

2. *Testacy.*

2. The will of D. [*design*], prefixed [*or* appended] hereto [*or* of which the foregoing is a notarial [*or* official] copy], is validly executed according to the law of [*State*].

3. The said copy is duly authenticated and entitled to the same credit and effect as the original will.

4. The testamentary executors named therein are entitled to obtain possession of the deceased's personal estate without giving sureties or finding caution;

or

4. The heirs or legatees named by the deceased in the said will are entitled to the administration of his personal estate without giving sureties or finding caution.

14. CONSULAR CERTIFICATE OF FOREIGN DOCUMENTS.

I [*name*], consul for at , hereby certify that the foregoing copy last will and testament and probate thereof are duly authenticated according to the law and practice of the State of , and entitled to full faith and credit throughout that State and elsewhere.

Witness my hand and consular seal this day of 19

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15. CERTIFICATE OF TRANSLATION.

I [*Consul, notary public, professor, or other qualified person*], being well acquainted with the language hereby certify that the foregoing is a faithful and correct translation into the English language of the document in the language, to which it is appended.

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16. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—GENERAL DISPONEE, UNIVERSAL LEGATORY, OR RESIDUARY LEGATEE, *by Succession.*

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* general disponee [*or* universal legatory; *or* residuary legatee], by succession, to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. By will dated , herewith produced, the said D. disponed and assigned his whole estate [*or* his whole personal estate; *or* the residue of his estate] to B. [*design*], who survived him, but died without expeding confirmation. The pursuer is the executor-nominate [*or* dative] of the said B., and has expede confirmation to his estate, including therein the interest of the said B in the estate of the said D., conform to confirmation [*describe*] also herewith produced. The pursuer is thus the general disponee [*or* universal legatory; *or* residuary legatee] of the said D., by succession to the said B.

PLEA IN LAW.

The pursuer, being general disponee [*or* universal legatory; *or* residuary legatee] of the said D., by succession to the said B., is entitled to be decerned executor-dative to the said D.

[*Sign twice as No.* 1.]

17. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—CHILD.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* next of kin to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The pursuer is a son of the said D., and one of his next of kin.

PLEA IN LAW.

The pursuer, being one of the next of kin of the said D., is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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18. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—GRANDCHILD.

[*As No.* **17** *except that, instead of Cond.* 2, *insert*]—

2. The pursuer is a son of the deceased B. [*design*], who was a son of the said D., and who predeceased him. The said D. was not survived by any son or daughter. The pursuer is thus a grandson of the said D., and one of his next of kin.

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19. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—BROTHER GERMAN.

[*As No.* **17**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. died without leaving issue, and unmarried. The pursuer is a brother of the said D. by the full blood, and is thus one of his next of kin.

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20. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—NEPHEW OR NIECE—FULL BLOOD.

[*As No.* **17**, *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister of the full blood. He was unmarried. The pursuer is a son of B. [*design*], who was a brother of the said D. by the full blood. The pursuer is thus a nephew of the said D., and one of his next of kin.

21. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—BROTHER CONSANGUINEAN.

[*As No.* 17, *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister of the full blood; nor by any descendant of a brother or sister of the full blood. He was unmarried. The pursuer is a brother of the half-blood consanguinean of the said D., and is thus one of his next of kin.

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22. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—NEPHEW—HALF-BLOOD.

[*As No.* 17, *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister, whether of the full blood or of the half-blood consanguinean; nor by any descendant of a brother or sister of the full blood. He was unmarried. The pursuer is a son of B. [*design*], who was a brother of the said D. by the half-blood consanguinean. The pursuer is thus a nephew of the said D. by the half-blood consanguinean and one of his next of kin.

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23. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—FATHER.

[*As No.* 17, *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister, whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister. He was unmarried. The pursuer is the father of the said D., and his next of kin.

Note.—In the plea omit "one of."

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24. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—UNCLE—FULL-BLOOD.

[*As No.* 17, *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by brother or sister, whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister. He was unmarried. He was predeceased by his father B. [*design*], and by his mother C. [*design*]. The pursuer is a brother of the said B., and is thus a paternal uncle of the said D., and one of his next of kin.

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25. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—COUSIN GERMAN.

[*As No.* 17, *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister, whether of the full blood or of the half blood consanguinean; nor by any

descendant of any such brother or sister; nor by his father or mother; nor by any brother or sister of his father of the full blood. He was unmarried. The pursuer is a son of B. [*design*], who was a brother by the full blood of E. [*design*], the father of the said D. The pursuer is thus a cousin of the said D. by the full blood, and one of his next of kin.

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26. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—UNCLE—HALF-BLOOD.

[*As No.* **17,** *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister, whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister; nor by his father or mother; nor by any brother or sister of his father by the full blood. He was unmarried. The pursuer is the brother by the half-blood consanguinean of B. [*design*], the father of the said D., and is thus the uncle of the said D. by the half-blood consanguinean and one of his next of kin.

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27. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—COUSIN—HALF-BLOOD.

[*As No.* **17,** *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister; nor by his father or mother; nor by any brother or sister of his father, whether of the full blood or of the half-blood consanguinean. He was unmarried. The pursuer is a son of B. [*design*], who was a brother by the half-blood consanguinean of E., the father of the said D. The pursuer is thus a cousin of the said D. by the half-blood consanguinean, and one of his next of kin.

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28. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—NEXT OF KIN—GRANDFATHER.

[*As No.* **17,** *except that, instead of Cond.* 2, *insert*]—

2. The said D. was not survived by issue; nor by any brother or sister, whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister; nor by his father or mother; nor by any brother or sister of his father, whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister of his father. He was unmarried. The pursuer is the paternal grandfather of the said D., and his next of kin.

Note.—In the plea omit "one of."

29. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—REPRESENTATIVE OF NEXT OF KIN.

[*As No.* **17**, *except that, instead of the pursuer's title* "next of kin," *insert* "representative of the next of kin," *and, instead of Cond.* 2, *insert*]—

2. The said D. died without issue. He was unmarried. He was survived by his brother B., who was thus his next of kin, but who died without having expede confirmation to his estate. The pursuer is the son and next of kin of the said B. [*or* executor-nominate and universal legatory of the said B., conform to will, dated , produced], and he is thus the representative of the said B., the next of kin of the said D.

Note.—In the plea insert "representative of" before "one."

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30. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—WIDOW OR WIDOWER.

[*As No.* **17**, *except that, instead of the pursuer's title* "next of kin," *insert* "relict," or "husband," *and, instead of Cond.* 2, *insert*]—

2. The pursuer is the widow [*or* surviving husband] of the said D.

PLEA IN LAW.

The pursuer, being the widow [*or* surviving husband] of the said D., is entitled to be decerned his [*or* her] executor-dative.

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31. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—CREDITOR.

[*As No.* **17**, *except that, instead of the pursuer's title* "next of kin," *insert* "creditor," *and, instead of Cond.* 2, *insert*]—

2. The pursuer is a creditor of the said D. to the extent of £ , conform to promissory note granted by the said D. in favour of the pursuer [*describe it*]—*or* conform to bond by the said D. [*describe it*], to which the pursuer acquired right by assignation [*describe it*]—*or* conform to decree *cognitionis causa* by the lords of council and session [*describe it*]—which [*or* an extract whereof] is herewith produced.

PLEA IN LAW.

The pursuer, being a creditor of the said D., is entitled to be decerned his executor-dative.

"GAZETTE" NOTICE.

An initial writ has been presented in the sheriff-court at Edinburgh by A. [*design*] for decerniture as executor-dative *qua creditor* [funerator] to the deceased D. [*agent's name and address*].

32. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—REPRESENTATIVE OF HUSBAND.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* representative of the husband to the deceased Mrs or D. [*design*].

CONDESCENDENCE.

1. The said Mrs or D., who was the wife of the also now deceased D. [*design*], died at on . She had at the time of her death her ordinary or principal domicile in the county of Edinburgh.

2. The said Mrs or D. was survived by her husband, the said D., who was entitled to one-half of her moveable estate *jure relicti*.

3. The said Mrs or D. died without issue. She was predeceased by her father and mother. She was survived by one brother german B. [*design*], and one sister german C [*design*]. The said B. and C. are thus the next of kin of the said Mrs or D., and entitled to her moveable estate equally between them, subject to the right of the said D. to *jus relicti*.

4. No confirmation has been expede by any one as executor to the said Mrs or D.

5. The said D. died, a widower, at on . He died without issue. He was predeceased by his father and mother. The pursuer is the only surviving brother german of the said D. He has been decerned and confirmed as executor-dative of the said D., conform to (1) decree-dative granted in this court, dated ; and (2) confirmation granted in this court, dated , herewith produced. In that confirmation there is included the interest of the said D. in the estate of his wife, the said Mrs or D. *jure relicti*. The pursuer is thus the representative of the said D., the husband of the said Mrs or D.

6. The said B. and C., the brother and sister german of the said Mrs or D., consent to this application conform to minute lodged by them in this process.

PLEA IN LAW.

The pursuer, being the representative of the husband of the deceased Mrs or D., is entitled to be decerned her executor-dative.

[*Sign twice as No.* 1.]

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33. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—CREDITOR OF NEXT OF KIN.

[*As No.* **17**, *except that, instead of the pursuer's title* "next of kin," *insert* "creditor of next of kin," *and, instead of Cond.* 2, *insert*]—

2. The said D. died intestate, and was survived by B. [*design*], his son and next of kin, who has declined [*or* delays] to expede confirmation to the

personal estate of the said D. The pursuer is a creditor of the said B. to the extent of £ , conform to [*describe debt as in No.* 31].

PLEA IN LAW.

The pursuer, being a creditor of the next of kin of the said D., is entitled to be decerned his executor-dative.

For "Gazette" notice, see No. 31, and adapt it.

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34. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—FUNERATOR.

[*As No.* **17**, *except that, instead of pursuer's title* "next of kin," *insert* "funerator," *and, instead of Cond.* 2, *insert*]—

2. The pursuer is funerator of the said D., having taken charge of the arrangements for the funeral, and paid the undertaker's account, amounting to £ . That account, duly discharged, is herewith produced. The estate left by the said D. is of small amount, and is believed to be insufficient to pay his debts. He is not known to have left any will, and his only next of kin is B. [*design*], who declines to apply for the office of executor [*or other circumstances*].

PLEA IN LAW.

The pursuer, being funerator of the said D., is entitled to be decerned his executor-dative.

For "Gazette" notice, see No. 31, and adapt it.

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35. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—LEGATEE.

[*As No.* **17**, *except that, instead of the pursuer's title* "next of kin," *insert* "legatee," *and, instead of Cond.* 2, *insert*]—

2. The pursuer is a legatee of the said D. to the extent of £ , conform to will, dated , herewith produced.

PLEA IN LAW.

The pursuer, being a legatee of the said D., is entitled to be decerned his executor-dative.

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36. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—FATHER.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* father to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The said D. died intestate and unmarried.

3. The pursuer is the father of the said D., who died without leaving issue, but survived by brothers and sisters [*or* without leaving issue or any brother or sister, but leaving descendants of brothers and sisters, *or otherwise according to circumstances*], and the pursuer has right to one-half of the moveable estate of the said D.

PLEA IN LAW.

The pursuer, having right to share in the moveable succession of the said D., is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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37. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—MOTHER (HALF).

[*As No.* **36,** *except that in the prayer, instead of* "*qua* father" *insert* "*qua* mother," *and, instead of Cond.* 3, *insert*]—

3. The pursuer is the mother of the said D., who died without leaving issue, and unmarried, and whose father predeceased him, but who was survived by brothers and sisters, and the pursuer has right to one-half of the moveable estate of the said D.

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38. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—MOTHER (WHOLE).

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh.

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executrix-dative *qua* mother to the deceased D. [*design*].

CONDESCENDENCE.

1. *As No.* **36.**

2. *As No.* **36.**

3. The pursuer is the mother of the said D. He was not survived by issue, nor by brother or sister whether of the full blood or of the half-blood consanguinean; nor by any descendant of any such brother or sister. He was predeceased by his father B. In these circumstances the pursuer is by statute entitled to the moveable estate of the said D.

PLEA IN LAW.

The pursuer, having right to the moveable estate of the said D., is entitled to be decerned his executrix-dative.

[*Sign twice as No.* 1.]

39. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—BROTHER UTERINE.

[*As No.* **36,** *except that in the prayer, instead of* "*qua* father," *insert* "*qua* brother uterine," *and, instead of Cond.* 3, *insert*]—

3. The said D. was not survived by issue; nor by any brother or sister german or consanguinean, nor by any descendants of any such brother or sister; nor by his father or mother. The pursuer is a brother uterine of the said D., and he, along with the said D.'s other brothers uterine and his sisters uterine and the descendants of a predeceasing brother uterine [*or as the case may be*] has right to one-half of the moveable estate of the said D.

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40. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—STATUTORY BENEFICIARY—CHILD OF A PREDECEASING NEXT OF KIN.

[*As No.* **36,** *except that in the prayer instead of* "*qua* father," *insert* "*qua* child of a predeceasing next of kin," *and, instead of Cond.* 3, *insert*]—

3. The said D. left no issue. At his death his next of kin were his brothers and sisters. The pursuer is a son of B. [*design*], who was also a brother [*or* sister] of the said D., but predeceased him. The pursuer is thus the child of a predeceasing next of kin of the said D. Accordingly the pursuer, along with his brothers and sisters [*if any*], and the descendants of a brother [*if any*], has right to the share of the moveable estate of the said D. to which the said B. would have been entitled if he had survived the said D.

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41. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—MINOR AND PUPIL NEXT OF KIN, WITH THEIR ADMINISTRATOR IN LAW.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A., B., C., and E. [*design all*], all children of F. [*design*], and the said F. as their administrator in law,—Pursuers;

The above-named pursuers crave the court,—

To decern the pursuers A., B., C., and E., executors-dative *qua* next of kin to the deceased D. [*design*];

or

To decern the pursuers executors-dative to the deceased D. [*design*], the said A., B., C., and E., *qua* next of kin, and the said F., their father, as their administrator in law.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The said D. was not survived by issue; nor by any brother or sister of the full blood; nor by any descendant of any such brother or sister, except in the case of his deceased sister G. [*design*]. The said D. was unmarried. The pursuers, A., B., C., and E. are the sons and daughters of the said G., and they are thus nephews and nieces and next of kin of the said D. The pursuers A. and B. are minors, and the pursuers C. and E. are pupils. The pursuer F. is their father and administrator in law.

PLEA IN LAW.

The pursuers A., B., C., and E., being the next of kin of the said D., are entitled to be decerned his executors-dative [and the pursuer F., being their father and administrator in law, is entitled to be decerned executor-dative along with them].

[*Sign twice as No.* 1.]

Note.—See advice, p. 77.

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42. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—MINOR AND PUPIL NEXT OF KIN, WITH THEIR FACTOR.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A., B., C., and E. [*design*], and F. [*design*], factor for them on the executry estate of D. [*design*],—Pursuers;

The above-named pursuers crave the court,—

To decern the pursuers executors-dative to the said D., the said A., B., C., and E., *qua* next of kin, and the said F. as their factor on the executry estate of the said D.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The pursuers A., B., C., and E., are the children and next of kin of the said D. The said A. and B. are minors, and the said C. and E. are pupils, and the said F. is their factor on the executry estate of the said D. conform to appointment by the sheriff of the Lothians and Peebles, at Edinburgh, dated , of which an extract is herewith produced.

PLEA IN LAW.

The pursuers A., B., C., and E., being the next of kin of the said D., are entitled to be decerned his executors-dative, and the said F., being their factor on the executry estate of the said D., is entitled to be decerned along with them.

[*Sign twice as No.* 1.]

Note.—See advice, p. 77.

43. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—FACTOR FOR MINOR AND PUPIL NEXT OF KIN ON EXECUTRY ESTATE.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*], factor for B., C., E., and F. [*design*], on the executry estate of D. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative to the deceased D. [*design*], *qua* factor for the said D.'s minor and pupil next of kin on his executry estate.

CONDESCENDENCE.

1. The said D. died at on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The said B., C., E., and F., are the children and next of kin of the said D. The said B. and C. are minors, and the said E. and F. are pupils, and the pursuer is factor for them on the executry estate of the said D. conform to appointment by the sheriff of the Lothians and Peebles, at Edinburgh, dated of which an extract is herewith produced.

PLEA IN LAW.

The pursuer, being factor for the next of kin of the said D. on his executry estate, is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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44. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—*Curator Bonis* AND FACTOR *loco Tutoris* TO NEXT OF KIN.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*], *curator bonis* to B. and C. [*design*], and factor *loco tutoris* to E. and F. [*design*], conform to act and decree of the lords of council and session dated ,—Pursuer;

The pursuer craves the court,—

To decern the pursuer executor-dative to the deceased D., [*design*], *qua curator bonis* and factor *loco tutoris* to his next of kin.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The said B., C., E., and F., are the children and next of kin of the said D., and the pursuer is their *curator bonis* and factor *loco tutoris* conform to the said act and decree of which an extract is herewith produced.

PLEA IN LAW.

The pursuer, being *curator bonis* and factor *loco tutoris* to the next of kin of the said D., is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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45. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE IN SCOTLAND—JUDICIAL FACTOR ON DECEASED'S ESTATE.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*], judicial factor on the estate [*or* on the trust estate] of the late D., after designed, conform to act and decree of the lords of council and session, dated , an extract of which is produced,—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative to the deceased D. [*design*], *qua* judicial factor on his estate [*or* on his trust estate].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh [*or* he was without any fixed or known domicile except that the same was in Scotland].

2. The pursuer is judicial factor on the estate of the said D. [*or* on the trust estate of the said D. under his will dated , in which the said D. appointed B. [*design*] and C. [*design*] to be his trustees and executors, but the said B and C both declined to accept office].

PLEA IN LAW.

The pursuer, being judicial factor on the estate [*or* on the trust estate] of the said D., is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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46. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—WIDOW OR HUSBAND.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* relict [*or* surviving husband] to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his [*or* her] death his [*or* her] ordinary or principal domicile furth of Scotland, namely in [*country*].

2. The said D. died intestate.

3. The pursuer is the widow [*or* surviving husband] of the said D., and by the law of , she [*or* he] is entitled to the administration of his [*or* her] personal estate.

PLEA IN LAW.

The pursuer, being entitled by the law of the deceased's domicile to the administration of his [*or* her] personal estate, is entitled to be decerned his [*or* her] executor-dative.

[*Sign twice as No.* 1.]

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47. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—CHILD AS NEXT OF KIN.

[*Same as No.* **46**, *except that in the prayer, instead of* "*qua* relict," *insert* "*qua* next of kin," *and, instead of Cond.* 3, *insert*]—

3. The pursuer is the son of the said D., whose wife [*or* husband] predeceased him [*or* her] [*or* whose wife [*or* husband] survived him [*or* her], but has renounced the right to administer his [*or* her] estate], and by the law of the pursuer is entitled to the administration of the personal estate of the said D.

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48. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—FATHER.

[*As No.* **46**, *except that in the prayer, instead of* "*qua* relict," *insert* "*qua* father," *and, instead of Conds.* 2 and 3, *insert*]—

2. The said D. died intestate and unmarried.

3. The pursuer is the father of the said D., and by the law of , the pursuer is entitled to the administration of his personal estate.

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49. INITIAL WRIT FOR APPOINTMENT AS EXECUTRIX-DATIVE—DOMICILE FURTH OF SCOTLAND—MOTHER.

[*As No.* **46**, *except that in the prayer, instead of* "*qua* relict," *insert* "*qua* mother," *and, instead of Conds.* 2 and 3, *insert*]—

2. The said D. died intestate and unmarried.

3. The father of the said D. was E. [*design*], who predeceased the said D.

4. The pursuer is the mother of the said D., and by the law of she is entitled to the administration of his personal estate.

50. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—BROTHER AS NEXT OF KIN.

[*As No.* **46**, *except that in the prayer, instead of* "*qua* relict," *insert* "*qua* next of kin," *and, instead of Conds.* 2 and 3, *insert*]—

2. The said D. died intestate and unmarried.

3. The father and mother of the said D. both predeceased him.

4. The pursuer is the brother and next of kin of the said D., and by the law of the pursuer is entitled to the administration of his personal estate.

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51. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE FURTH OF SCOTLAND—CONFORM TO FOREIGN APPOINTMENT.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* brother and administrator [*or* curator on the succession, *or other character, as the case may be*] of the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile furth of Scotland, namely in [*country*].

2. The pursuer is the brother of the said D., and administrator [*or* curator] of his personal estate, appointed by [*describe the court*], conform to letters of administration [*or other writ instructing the appointment*] produced.

PLEA IN LAW.

The pursuer, being the administrator of the deceased's personal estate, appointed by the court of his domicile, is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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52. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—FOREIGN DOMICILE—CONFORM TO OPINION ON FOREIGN LAW.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* [*insert character in terms of opinion*] to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile furth of Scotland, namely in [*country.*]

2. The pursuer is [*state relationship or other character giving right to the office in accordance with opinion*], and is by the law of entitled to the administration of the personal estate of the said D. conform to opinion, herewith produced, by B. [*design and state qualifications*].

PLEA IN LAW.

The pursuer, being entitled by the law of the deceased's domicile to the administration of his personal estate, is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

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53. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE—DOMICILE UNCERTAIN—APPLICANT ALTERNATIVELY ENTITLED.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *qua* father [*or other character*] to the deceased D. [*design.*]

CONDESCENDENCE.

1. The said D., who resided sometime in Edinburgh, thereafter in New York, thereafter in Melbourne, Australia, died while on a voyage from Melbourne to New York.

2. There is uncertainty as to his ordinary or principal domicile, but it was in one or other of the following three countries or states, namely (1) Scotland, (2) the State of New York in the United States of America, (3) the State of Victoria in the Commonwealth of Australia.

3. The said D. died intestate and unmarried.

4. The pursuer is the father of the said D. The laws of the said three countries or states concur in holding that in the circumstances averred the pursuer is entitled to the administration of the personal estate of the said D. Opinions regarding the laws of the State of New York and of Victoria are herewith produced.

PLEA IN LAW.

The pursuer, being entitled by the law of the deceased's domicile to the administration of his personal estate, is entitled to be decerned his executor-dative.

[*Sign twice as No.* 1.]

54. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE ON DECREE UNDER PRESUMPTION OF LIFE LIMITATION (SCOTLAND) ACT, 1891.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. and B. [*design them*],—Pursuers;

The above-named pursuers crave the court,—

To decern the pursuers executors-dative *qua* next of kin to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. is presumed to have died on [*date fixed by the court*]. He was at that date domiciled in the county of Edinburgh [*or* without any fixed or known domicile except that the same was in Scotland].

2. By decree of the lords of council and session [*or* of the sheriff of] under the Presumption of Life Limitation (Scotland) Act, 1891, dated , it was found that the said D. should be presumed to have died on . An extract of the said decree [*or* a copy certified by clerk of court] is produced herewith.

3. The said D. died intestate. He left no issue. He was unmarried.

4. The pursuers are brothers of the said D., and are thus two of his next of kin.

PLEA IN LAW.

The pursuers, being next of kin of the said D. who is presumed to have died on , are entitled to be decerned his executors-dative.

[*Sign twice as No.* 1.]

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55. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE, *ad omissa* [*et male appretiata*].

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *ad omissa* [*et male appretiata*] *qua* next of kin [*or as the case may be*], to the deceased D. [*designed*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. An inventory of the personal estate of the said D. was given up, and recorded in the court books of the commissariot of Edinburgh on , and confirmation thereof was expede on , in favour of B. [*design*], as executor-dative *qua* next of kin [*or other character*] to the said D. [*or* as executor-nominate of the said D. under his will, dated].

3. There was omitted from that confirmation certain estate belonging

to the said D. [and certain items of estate, though included, were undervalued therein]. It is necessary that a title should now be made up by confirmation to the items and values thus omitted in order to uplift and discharge the same.

4. The said B. is now dead, and the pursuer is a son and next of kin of the said D. [*or as the case may be*].

5. In respect that the executor already confirmed is now dead no special intimation of this writ is necessary.

PLEA IN LAW.

Certain personal estate of the said D. still remaining unconfirmed, the pursuer being his next of kin [*or as the case may be*], is entitled to be decerned his executor-dative *ad omissa* [*et male appretiata*].

[*Sign twice as No.* 1.]

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56. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE *ad non executa.*

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To decern the pursuer executor-dative *ad non executa qua* legatee [*or* next of kin, *or as the case may be*] to the deceased D. [*designed*].

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. An inventory of the personal estate of the said D. was given up and recorded in the court books of the commissariot of Edinburgh on , and confirmation thereof was expede on , in favour of B. [*design*] as executor-nominate of the said D. under his will, dated ; [*or* as executor-dative *qua* relict, *or* next of kin, &c., decerned to him on], but the said B. has died leaving part [*or* the whole] of the estate confirmed by him untransferred to the persons entitled to it, part thereof being still unuplifted and part uplifted and invested or remaining in the said executor's hands [*as the case may be*]. It is necessary that a title should now be made up by the appointment of an executor *ad non executa* to continue and complete the administration of the estate contained in the said confirmation.

3. The pursuer is a son and next of kin of the said D. [*or* a legatee of the said D. under his will produced, *or as the case may be*].

4. In respect that the executor already confirmed is now dead no special intimation of this writ is necessary.

PLEA IN LAW.

The confirmation to the personal estate of the said D. having become inoperative by the death of the executor, the pursuer is entitled to be decerned executor-dative *ad non executa.*

[*Sign twice as No.* 1.]

57. INITIAL WRIT FOR RECALL OF DECREE-DATIVE AND TO BE SUBSTITUTED OR CONJOINED.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To direct intimation of this petition to be made to B. [*design*], and thereafter to recall the decree-dative in her favour after mentioned, and to decern the pursuer executor-dative *qua* next of kin to the deceased D. [*design*]; or otherwise to conjoin this writ with the writ at the instance of the said B., and to decern both pursuers executors-dative *qua* next of kin to the said D.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. On an initial writ presented in the Sheriff Court at Edinburgh by B. [*design*], sister of the said deceased, the said B. was on decerned executor-dative *qua* next of kin to the said D., but she has not yet extracted the decree or expede confirmation.

3. The said D. died without issue. He was unmarried. The pursuer is his brother, and is thus also one of his next of kin.

PLEA IN LAW.

The pursuer, being one of the next of kin of the said D., is entitled to have the decerniture in favour of the said B. recalled, and to be substituted for or conjoined with her in the office of executor-dative to the said D.

[*Sign twice as No.* 1.]

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58. INITIAL WRIT FOR APPOINTMENT AS EXECUTOR-DATIVE *ad omissa* WHEN THE ORIGINAL CONFIRMATION WAS UNDER THE SMALL ESTATE ACTS, BUT THE TOTAL EXCEEDS £500.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*], Pursuer;

The pursuer craves the court to decern him executor dative *ad omissa qua* next of kin to the deceased D. [*design*].

CONDESCENDENCE.

1. The said D. died at on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. An inventory of the personal estate and effects of the said deceased D. was in terms of the Act 57 & 58 Vict. cap. 30, sec. 23, sub-section (7) given up and recorded in the court books of the commissariot of Edinburgh on , and confirmation nominate thereof was expede on in favour of the pursuer as executor-dative *qua* next of kin of the said D.

3. There was omitted from said confirmation certain estate of the said D., to which omitted estate it is necessary that a title should now be made up by confirmation in order to uplift and discharge the same, but as the amount thereof, together with the sum given up in the original inventory, will now exceed £500, the limit under which an eik to the said confirmation nominate might have been expede, it is therefore incompetent to grant an eik to the said confirmation, and the present application has become necessary.

4. The said D. died unmarried, without issue, and without leaving any brother or sister german or consanguinean or any descendant of any such brother or sister.

5. The pursuer is the father of the said D., and is thus his next of kin.

PLEA-IN-LAW.

The pursuer being the next of kin of the said deceased D., is entitled to be decerned his executor-dative *ad omissa*.

[*Sign twice as No.* 1.]

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59. INITIAL WRIT FOR APPOINTMENT OF FACTOR FOR MINOR AND PUPIL, NEXT OF KIN ON EXECUTRY ESTATE.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. and B. [*design*], along with C., E., F., and G. [*design*],— Pursuers;

The above-named pursuers crave the court,—

To appoint the said C., or such other person as the court may think fit, to be factor for the said A. and B. on the executry estate of the deceased D. [*design*], with power to have himself decerned and confirmed as executor-dative to the said D. *qua* factor foresaid, for behoof of the said A. and B. and of all interested in the said estate, on his finding caution for his intromissions therewith, and that the same shall be made forthcoming to the said A. and B. and all interested in common form; or to do further or otherwise in the premises as to the court may appear proper.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. The said A. and B. are the only children and next of kin of the said D., and are entitled to be his executors, but the said A. being in minority, and the said B. in pupillarity, they have not the *status* which would qualify them in their own names to administer his personal estate; and having no tutors or curators, or other legal guardians, it is necessary that a factor be appointed for them on the said estate to administer the same for behoof of them and all interested.

3. The mother of the said A. and B. predeceased their father, and the pursuers C. and E. are the paternal uncle and aunt, and the pursuers F. and G. are the maternal uncles, of the said A. and B.

4. The pursuers respectfully suggest to the court that the said C. is a fit and proper person to be appointed to the office of factor, he being willing to undertake the duties thereof.

PLEA IN LAW.

The pursuers A. and B. being the minor and pupil next of kin of the said D., and having no legal guardians, are entitled to have a factor appointed for them on the executry estate of the said D.

[*Sign twice as No.* 1.]

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60. INITIAL WRIT FOR RESTRICTION OF CAUTION.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To appoint intimation of this application to be made in such newspapers as to the court may seem meet, and thereafter to restrict the caution to be found by the pursuer as executor-dative of the deceased D. [*design*], to the sum of £ , or to such other sum as to the court shall seem proper.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. The pursuer was decerned executor-dative *qua* to the said D. on , and has since prepared and given up an inventory of his personal estate amounting in value to £ , and craved confirmation thereof.

3. The debts left due by the said D., together with his funeral expenses, have already been paid by the pursuer, and the pursuer is the sole next of kin of the said D. and the only person beneficially interested in his estate.

or

3. The amount of the debts due by the said D. and his funeral expenses do not exceed £ . The parties beneficially interested in his estate after payment of his debts are his widow B.; his three surviving children—viz., the pursuer, and E. and F. [*design both*]; and the children of C. [*design*], a daughter of the said D., who predeceased him—viz., G. and H. [*design both*]. The said B. and E. consent to this application. The consent of the said F. cannot be obtained in consequence of his residence abroad. The said G. and H. are in minority, but their father I., as their administrator-in-law, also consents.

4. Before confirmation can be expede the pursuer requires to find caution for his intromissions as executor, but in the circumstances above averred he submits that he is entitled to have the amount of caution restricted.

PLEA IN LAW.

It being competent for the court to fix the caution to be found by the pursuer, he is entitled in the circumstances of this case to have the same restricted as craved.

[*Sign twice as No.* 1.]

CONSENT.

We consent to the prayer of the foregoing initial writ being granted.

[*Or if a separate paper.*]

We consent to the caution to be found by A. in the confirmation to be expede by him as executor of the late D. being restricted to the sum of £ .

INTIMATION IN NEWSPAPERS.

Commissariot of Edinburgh.

An initial writ having been presented to the sheriff of the Lothians and Peebles at Edinburgh by A. [*design*], craving that the caution to be found by him as executor-dative *qua* next of kin [*or other character*] to D. [*design*] may be restricted to £ , any person having objections thereto has been ordained to lodge the same with the commissary clerk within ten days from the date of this advertisement.

[*Signed by pursuer or his agent.*]

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61. NOTE OF OBJECTIONS TO RESTRICTION OF CAUTION.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

Note of Objections by A. [*design*],

TO

The Restriction of Caution applied for by B. and C. [*design*], sons and executors-dative *qua* next of kin of the deceased D. [*design*].

The objector is a creditor of the said D. to the extent of £ , for the payment of which he has no security, and he objects to the amount of caution to be found by the said B. and C. as executors-dative being restricted, as craved in their petition [*or other grounds for opposing the restriction*].

[*Signed by objector or agent.*]

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62. INITIAL WRIT FOR WARRANT TO SEAL REPOSITORIES.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer;

The above-named pursuer craves the court,—

To grant warrant to the commissary clerk or his assistants to repair to the dwelling-house of the deceased D. [*design*], and to cause seal up his repositories with the seal of court, to remain thereon until the said D. is interred, and thereafter to remove the seals, and to take inventory of what cash, papers, or effects may be found therein, as also to make inventory of the deceased's household furniture and other effects, all in order to confirmation.

CONDESCENDENCE.

1. The said D. died this morning [*date*] at . He had his ordinary or principal domicile in the county of Edinburgh.

The pursuer is a son of the said D., but he does not know whether his father has left any will, or how his affairs may turn out, and whether or not there will be sufficient funds to pay the debts.

PLEA IN LAW.

It being competent for the court to grant the warrant craved, it is proper in the circumstances above averred that it should be granted.

[*Sign twice as No.* 1.]

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63. INITIAL WRIT FOR WARRANT TO EXAMINE REPOSITORIES AND SECURE EFFECTS.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

A. [*design*],—Pursuer ;

The above-named pursuer craves the court,—

To grant warrant to the commissary clerk, or his assistants, to open and examine the repositories after mentioned of the deceased D., [*design*], particularly with the view of ascertaining whether he has left any will ; to take possession of any money, papers, or effects, or such part thereof as it may appear necessary and proper to remove for safe custody, and to hold the same subject to future orders of court ; to secure the property and premises of the said D. as may appear necessary and expedient in the meantime ; and to report to the court ; and thereafter to grant such further orders for the custody and disposal of the said money, papers, property, and effects as to the court may seem proper.

CONDESCENDENCE.

1. The said D. died at , on . He had at the time of his death his ordinary or principal domicile in the county of Edinburgh.

2. The said D. is believed to have left considerable personal estate, but it is not known whether he has left any will, or has appointed executors. His next of kin are his nephews and nieces, most of whom are resident abroad, and as there is no one with a title to take charge of his affairs, it has been considered desirable to make this application.

3. The said D. carried on business as a [*trade or profession*], at , and resided in furnished lodgings at , in both of which places he has left papers and effects which it is necessary to examine and secure.

4. The pursuer is a nephew and one of the next of kin of the said D. [*or other interest*].

PLEA IN LAW.

It being competent for the court to grant the warrant craved, it is proper in the circumstances that it should be granted.

[*Sign twice as No.* 1.]

64. MINUTE BY EXECUTORS-DATIVE FOR RECALL OF DECREE—(1) WHERE ERROR IN PETITION; (2) WHERE DECREE-DATIVE UNNECESSARY; (3) WHERE ONE OF THE EXECUTORS HAS DIED OR, (4) WHERE ONE OF THEM DESIRES TO WITHDRAW.

[*Written on initial writ.*]

(1)

The pursuer [*or his agent*] stated that in the foregoing initial writ the name of the pursuer [*or* of the deceased] had been *per incuriam* written instead of [*or otherwise describe the error*], and he craved that the decerniture thereon might be recalled in order that a new writ might be presented.

[*Date.*] [*Signed by pursuer or agent.*]

(2)

The pursuer [*or his agent*] stated that, since the date of the foregoing decree-dative, it had been discovered to be unnecessary and incompetent, in respect that the deceased D. left a will in which he appointed executors-nominate, who have accepted office, and he craved recall of the said decree accordingly.

[*Date.*] [*Signed by pursuer or agent.*]

(3)

The pursuers A. and B. [*or their agent*] stated that since the date of the decree-dative in favour of them, and of the pursuer C., the said C. had died, and they [*or* he] craved that the said decree should be recalled, and that the pursuers A. and B. should be of new decerned as executors-dative to the said deceased D.

[*Date.*] [*Signed by A. and B. or agent.*]

(4)

The pursuers A., B., and C. [*or their agent*] stated that since the date of the decree-dative in their favour, it had been arranged that confirmation should be issued in favour of A. and B. alone, and the pursuers [*or* he] craved that the said decree should be recalled, and that the pursuers A. and B. should be of new decerned as executors-dative to the said deceased D.

[*Date.*] [*Signed by pursuers or agent.*]

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65. CAVEAT AGAINST CONFIRMATION OR DECERNITURE.

Commissariot of Edinburgh.

Caveat for A. [*design*], one of the next of kin of the deceased D. [*design*] [*or state interest*].

It is requested that if any application for confirmation to the said D. or any inventory of his personal estate, or any writ for the appointment of executor to the said D., should be lodged with the commissary clerk, intimation thereof may be sent to the subscriber.

[*Signed by party or agent.*]

N.B.—Caveats fall on the expiry of one month, but may be renewed.

66. NOTE OF OBJECTIONS TO ISSUE OF CONFIRMATION.

Commissariot of Edinburgh.

Sheriffdom of the Lothians and Peebles, at Edinburgh,

Note of objections by A., B., and C. [*design*], nephew and nieces and next of kin of the deceased D. [*design*],

TO

The issuing of Confirmation in favour of E. as executor-nominate of the said D.

1. The said D. died on . At the time of his death he was upwards of eighty years of age, and for some years he had been in feeble health. He latterly lived with the said E., who had great influence over him, and who has now assumed the entire control of his affairs, and refuses to the objectors access to his repositories.

2. The will founded on is alleged by the said E. to be holograph of the said D., but the objectors, who reside at a distance, have not had time to satisfy themselves that this is so, nor whether there may not be other testamentary writings left by the deceased not exhibited by the said E. They have reason to believe that such writings exist, and they object to confirmation being issued, at least until they have had full time and opportunity to make further inquiries in the matter.

[*Signed by objectors or agent.*]

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67. VARIATIONS ON OATH.

(1) WHERE SEALING OF NORTHERN IRISH GRANT IS REQUIRED.

That a grant of probate of the will [*or* letters of administration, *or* letters of administration with the will annexed] of the said deceased D. was made to the deponent by the High Court of Justice in Northern Ireland on , which probate [*or otherwise*] is now exhibited and signed by the deponent and the said as relative hereto, and a full copy thereof is also produced herewith. That the deponent has entered, or is about to enter, upon the possession and management of the deceased's estate as executor [*or* administrator] foresaid. That the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal or moveable estate or effects, or any part thereof, other than that before mentioned. That the foregoing inventory signed by the deponent and the said is a full and complete inventory of the personal or moveable estate and effects of the said deceased wheresoever situated, and belonging or due to him beneficially at the time of his death in so far as the same have come to the deponent's knowledge. That the amount of estate duty and interest thereon payable upon this inventory, as particularly shown in the statement for estate duty and summary annexed hereto, is paid to the commissioners of inland revenue. That it is now required that the said probate [*or* letters of administration] should be sealed with the seal of the Commissariot of Edinburgh in terms of the Government of Ireland Act, 1920, and relative Order dated 31 January 1922 [*or* 27 March 1923].—All which is truth, etc.

(2) WHERE SEALING OF COLONIAL GRANT IS REQUIRED

That a grant of probate of the will [*or* letters of administration, *or* letters of administration with the will annexed] of the said deceased [*name*]

was made to the deponent [*or where the oath is taken by an attorney or mandatory for the executor or administrator*, to the said executor or administrator] by the [*court*] on which probate [*or* letters, &c., *or* a duplicate, *or* duly certified copy thereof] is now exhibited and signed by the deponent and the said as relative hereto; and a full copy thereof is also produced herewith. [*Instead of craving for confirmation, the oath will conclude thus*]. And it is now required that the said probate [*or* letters, &c.] should be sealed with the seal of the commissariot of Edinburgh in terms of the Colonial Probates Act, 1892, and relative rules of court dated 9 June 1893.—All which is truth, &c.

(3) Where Trustees and Executors have been Assumed.

That the deponent is executor-nominate of the said [*name*], who by trust-disposition and settlement [*describe it and any other testamentary writings relating to the appointment of executors*] herewith exhibited and signed by the deponent and the said as relative hereto, nominated A., B., and the deponent, and such other persons as might be assumed as trustees under the said trust-disposition and settlement, to be his executors. That the said A. predeceased the testator, and the said B. declined to accept. That the deponent by deed of assumption dated , also herewith exhibited and signed as relative hereto, assumed D. and E. [*design*] as trustees [*or* as trustees and executors] under the said trust-disposition and settlement. That the deponent, along with the said D. and E. trustees, and as executors foresaid, have entered upon the possession and management of the deceased's estate.

(4) General Disponees.

That the deponent is the general disponee of the estate heritable and moveable of the said D. conform to his will dated , and registered in the books of council and session on and of which an extract is herewith exhibited, and is signed by the deponent and the said as relative hereto. That the said D. appointed no trustees or executors and that accordingly the deponent is the executor-nominate of the said D.

(5) Residuary Legatee.

That by his will dated , and registered in the books of council and session on , the said D. appointed A., B., and C. to be his trustees and executors, and he bequeathed the residue of his estate heritable and moveable to the deponent. That the said A. and B. predeceased the said D., and the said C. has declined office, and that accordingly the deponent is the executor-nominate of the said D.

(6) Affirmation instead of Oath.

At Edinburgh, the day of , 19 , in presence of

Appeared A. B., who objected to being sworn, and stated as the ground of his objection that he has no religious belief [*or* that the taking of an

oath is contrary to his religious belief], and who made his solemn affirmation as follows:—I do solemnly and sincerely affirm that the said died, &c. [*the averments being made in the first person*].—All which is truth.

Affirmed at Edinburgh this day of , 19 .

Before me,

(7) Supplementary or Additional Oath.

At Edinburgh, the day of , 19 , in presence of

Appeared , who being solemnly sworn and examined, depones that since the foregoing deposition was made, A. B., who is therein mentioned as one of the accepting and acting executors of the deceased, has died [*or* has resigned]; [*or* that an additional testamentary writing [*describe it*] has been discovered and is herewith exhibited and signed as relative hereto; or *otherwise as the case may be.*] [*Should this deposition be made by a different executor, add,* That except as herein specified the deponent concurs *in omnibus* with the preceding deposition.]—All which is truth, as the deponent shall answer to God.

(8) Where an Eik is required.

That confirmation of the additional estate now given up is required in favour of the deponent along with A. and B. [*design*], the other executors in whose favour the original confirmation was granted [*or* in favour of the deponent, A. and B., the other executors previously confirmed, having ceased to act, the said A. having resigned and the said B. being now deceased; *or* in favour of the deponent, and C. and D. [*design*], whom the deponent has assumed to act along with him as executors-nominate of the said deceased, conform to deed of assumption [*describe it*] herewith exhibited and signed as relative hereto].—All which is truth, etc.

(9) Where Confirmation *ad omissa vel male appretiata is* required.

That the executors in whose favour the original confirmation was granted are now dead. That confirmation *ad omissa* is now required in favour of the deponent as substitute executor-nominate under [*describe deed*] recorded in the court books of the commissariot of Edinburgh on , [*or* as executor-dative *ad omissa qua* next of kin [*or other title*] decerned in the sheriff court of Edinburgh on].—All which is truth, etc.

(10) Oath for Confirmation *ad omissa* where the original Confirmation was under the Small Estate Act but the Total exceeds £500—Testate.

That an inventory of the moveable estate of the said deceased was given up in the commissariot of Edinburgh on , and confirmation-nominate was granted on to the deponent and B. and C. [*design*] as executors nominated by the said D. in his will dated , which was recorded in the court books of the said commissariot on , which confirmation-nominate was granted in terms of the Act 57 & 58 Vict.

c. 30, s. 23, sub-sec. (7), but the estate since discovered together with the sums given up in the original inventory exceeds £500, the limit under which an eik to the said confirmation-nominate might have been expede. That the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal or moveable estate or effects or any part thereof other than the said will. That the foregoing is a full and complete inventory of the personal or moveable estate of the said deceased, as ascertained and discovered since the said inventory was given up and recorded as aforesaid. That the estate duty and interest thereon now payable in respect of the additional estate now given up, as particularly shown in the statement and schedules hereunto annexed, is paid to the commissioners of inland revenue. That confirmation of the said additional estate *ad omissa* in Scotland [*or* and England] is now required in favour of the deponent and the said B. and C.—All which is truth, etc.

(11) Oath by Attorney for Executor Abroad.

At Edinburgh, the day of , 19 , in presence of .

Appeared , attorney for [*name and designation*], conform to power of attorney herewith exhibited and signed by the deponent and the said as relative hereto, who being solemnly sworn, &c. [*Confirmation being craved in favour of the executor.*]

Docquet on Documents Exhibited.

[*Place and date.*]—Referred to in my deposition of this date to the Inventory of the personal estate of the deceased [*name*].

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68. OATH for Confirmation after Inventory has been Recorded.

At , the day of , one thousand nine hundred and .

In presence of

Appeared , executor-nominate [*or* dative] of the deceased , who, being solemnly sworn and examined, depones that the said deceased died at , on : That an inventory of his personal estate and effects was given up and recorded in the court books of the commissariot of Edinburgh on , but no confirmation was then required or has since been expede: That the deponent has not discovered any other personal estate or effects belonging to the deceased: That the said inventory is a full and true inventory of all the personal or moveable estate or effects of the said deceased, wheresoever situated, already recovered or known to be existing belonging or due to him beneficially at the time of his death, in so far as the same has come to the deponent's knowledge: That confirmation of the said personal estate is now required in favour of the deponent, as executor-nominate under the will of the said , dated [*or* as executor-dative

qua decerned to the said deceased in the sheriff court of Edinburgh on].—All which is truth, as the deponent shall answer to God.

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69. INVENTORY AND OATH WHERE THE ONLY ADDITIONAL ESTATE CONSISTS OF FUNDS HELD BY THE DECEASED AS SOLE OR LAST SURVIVING TRUSTEE OR EXECUTOR-NOMINATE.

CORRECTIVE ADDITIONAL INVENTORY of the personal estate of the deceased who died at on the day of .

	£		
Gross amount of the personal estate given up in the original inventory of the deceased's estate recorded in the court books of the commissariot of Edinburgh on , and of which confirmation was granted on			
EFFECTS OMITTED.			
It has been ascertained since the original inventory was given up and confirmation granted that the funds specified in the note appended hereto were held by the deceased as a last surviving trustee [*or* executor-nominate]. No additional estate has been discovered belonging beneficially to the deceased, but for the purpose of obtaining confirmation of an inventory having annexed thereto a note of the said funds held by him in trust, his estate already confirmed is held to have an additional value not exceeding	£	5	0	0

NOTE.—Trust Funds.

(*Describe them, and where situated.*)

NOTE.—*The additional estate being nominal, no further duty is payable.*

At , the day of , one thousand nine hundred and .

In presence of

Appeared executor-nominate of the said deceased D. , who, being solemnly sworn and examined, depones that the said deceased died at domiciled in Scotland, on : That the foregoing is a corrective additional inventory of the personal estate of the said deceased, as ascertained and discovered since , when the original inventory of the deceased's estate was recorded in the court books of the commissariot of Edinburgh: That the deponent has not discovered any other estate or effects belonging to the deceased: That the said inventory, which is signed as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased wheresoever situated, already recovered or known to be existing, belonging or due to him beneficially at the time of his death, in so far as the same has come to the deponent's knowledge: And confirmation of the estate given up in this corrective additional inventory is required in favour of .—All which is truth, as the deponent shall answer to God.

70. SUPPLEMENTARY INVENTORY, WITH NOTE OF TRUST FUNDS IN ENGLAND: AND OATH THERETO.

SUPPLEMENTARY INVENTORY of the personal estate, wheresoever situated, of , who died at , on the day of , 19 .

Amount of the deceased's personal estate in Scotland given up in the inventory thereof recorded in the court books of the commissariot of Edinburgh, on £	

NOTE.—Funds in England held by the deceased in trust:

£100 stock of the Bank of England standing in name of the trustees under antenuptial contract of marriage between and [*design*] dated and of which trustees the deceased was the sole survivor.

NOTE.—*No duty.*

At , the day of , one thousand nine hundred and

In presence of

Appeared , executor-nominate [*or* dative] of the said deceased D., who, being solemnly sworn and examined, depones that the said deceased died at domiciled in Scotland, on : That a full and complete inventory of the personal estate belonging or due beneficially to the said deceased , was exhibited and recorded in the court books of the commissariot of Edinburgh on and that confirmation of said personal estate in Scotland was expede in favour of the deponent and as executors nominated by the deceased in his will dated , and recorded along with the said inventory in the court books of the commissariot of Edinburgh, on [*or* executor-dative *qua* decerned to the said deceased , in the sheriff court of Edinburgh, on]: That the deponent has not discovered any other estate or effects belonging or due beneficially to the deceased: but it has been ascertained that the deceased held in trust the funds in England specified in the Note to the foregoing inventory, and it is now required by the executors that a corresponding Note be appended to the said confirmation in terms of section 43 of the Act 39 & 40 Vict. c. 70.—All which is truth, as the deponent shall answer to God.

FORM IN WHICH NOTE IS APPENDED.

The Note is appended by making an indorsation on the confirmation, as follows:—

EDINBURGH, 19 .—The following Note set forth in a supplementary inventory of the personal estate of the deceased , recorded in the court books of the commissariot of Edinburgh on [*date*], viz.—

[*Take in Note from Inventory.*]

Appended and signed by me in terms of the Act 39 & 40 Vict. c. 70, sect. 43.

[*Signed by commissary clerk or his depute.*]

NOTE.—The deceased died domiciled in Scotland.

[*Signed by clerk.*]

NOTE.—*This form is not available for trust funds in Scotland.*

71. POWER OF ATTORNEY TO MAKE OATH, AND APPLY FOR CONFIRMATION.

(1) WHERE EXECUTOR ALREADY APPOINTED.

I, A. B. [*design*], considering that I am the executor nominated by the deceased C. D. [*design*], in his will dated , [*or* executor-dative decerned to the deceased , by decree dated], and that I am about to enter on the possession and management of the personal estate [in Scotland] of the said deceased, and it is necessary that I should exhibit and record in the proper court in Scotland an inventory of said personal estate, but that, in consequence of my residence abroad, it would be inconvenient for me to do so personally, do therefore hereby authorise and empower E. F. [*design*] as my attorney, to give up an inventory of the said personal estate, make oath thereto, and record the same in the books of said Court, and also to crave confirmation thereof in my favour as executor foresaid [and to procure the same resealed in England and Northern Ireland and the Irish Free State or to procure grants of representation in those countries in my favour to the said deceased].—In witness whereof,

[*No stamp.*]

(2) WHERE EXECUTOR NOT YET APPOINTED.

I, A. B. [*design*], considering that I am a son and one of the next of kin [*or as the case may be*] of the deceased C. D. [*design*], and that I am about to apply to be decerned and confirmed in Scotland as his executor-dative, but that in consequence of my residence abroad it would be inconvenient for me to do so personally, do therefore hereby authorise and empower E. F. [*design*] as my attorney for me and in my name to present a writ in the proper court, and obtain decerniture in my favour as executor foresaid, and thereafter to give up an inventory of the personal estate of the said C. D., make oath thereto, and record the same in the books of said court, and also to crave confirmation thereof in my favour as executor foresaid [*and if desired proceed as at end of preceding form*].—In witness whereof,

[*No stamp.*]

(3) INCLUDING POWERS TO UPLIFT AND DISCHARGE.

[*The following may be inserted in either of the two preceding forms immediately before the Testing Clause.*]

And I further authorise and empower my attorney for me and in my name as executor foresaid to uplift and receive, administer and dispose of the personal estate and effects to which he may obtain confirmation [or representation] in my favour as aforesaid, to grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that I as executor foresaid could do if personally present. And I bind myself, and my heirs and successors, to ratify and confirm whatever my attorney may do or cause to be done in virtue of the powers conferred upon him by these presents.—

[*If these clauses are added, stamp* 10s.]

(4) For Resealing Probate, &c., under Colonial Probates Act.

I, A. B. [*design*], considering that the deceased C. D. [*design*] died at on leaving a last will and testament dated in which he appointed me to be his executor, and that probate of the said last will and testament was [*or* considering that the deceased died at on , and that letters of administration (*or* letters of administration with the will annexed) were] granted in my favour by the probate court at in the Dominion of on , and that the said deceased left personal estate in Scotland to which I require to make up a title in the proper court of that country in order to uplift and administer the same, and that in consequence of being resident abroad, it would be inconvenient for me to do so personally, do therefore hereby authorise and empower as my attorney, to give up an inventory of the said personal estate in Scotland, make oath thereto, and exhibit the same in the sheriff court of the county of Edinburgh along with the said probate [*or* letters of administration; *or* letters of administration with the will annexed], and to crave that the said probate [*or as the case may be*] may be sealed with the seal of the commissariot of Edinburgh, under and in terms of the Colonial Probates Act, 1892: and thereafter to uplift, receive, administer, and dispose of the said personal estate in Scotland, to grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that I, as executor [*or* administrator] foresaid, could do if personally present: And I bind myself, my heirs and successors, to ratify and confirm whatever my attorney may do or cause to be done in virtue of the powers conferred upon him by these presents.—In witness whereof.

Note.—It may be desired to widen this so as to apply also to England and Southern and Northern Ireland.

[*Stamp* 10s.]

72. BOND OF CAUTION for Executor-Dative.

I, , do hereby bind and oblige me, my heirs and successors, as cautioners and sureties acted in the court books of the commissariot of Edinburgh, that the sum of £ [*or* to the extent of £] that the sum of £ , contained in the testament-dative of umquhile , wherein is only executor-dative *qua* , decerned, and to be confirmed to him, shall be made free and furthcoming to all parties having interest therein as law will, the said executor being always bound for my relief as cautioner in the premises; and both parties subject themselves, their heirs and successors, to the jurisdiction of the sheriff of the Lothians and Peebles in this particular, and appoint the commissary clerk's office in Edinburgh as a domicile whereat they may be cited to all diets of court, at the instance of all and sundry having interest therein as law will, holding any citation legally affixed and left for us upon the walls of said office as sufficient as if we were personally summoned.—In witness whereof.

[*Both sign.*]

Attestation of Cautioner.

I, , one of His Majesty's justices of the peace for the county of , do hereby certify that is

reputed a good and sufficient cautioner for the sum of £ , being the amount of the obligation undertaken by the within bond of caution.

[*Name*]
[*Place*]
[*Date*]

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73. BOND OF CAUTION under Small Estates Acts.

I, , do hereby bind and oblige me, my heirs and successors, as cautioners and sureties acted in the court books of the commissariot of Edinburgh, that the sum of £ , contained in the confirmation-dative of umquhile , wherein is only executor-dative *qua* , to be decerned and confirmed to him, shall be made free and furthcoming to all parties having interest therein as law will, the said executor being always bound for my relief as cautioner in the premises; and both parties subject themselves, their heirs and successors, to the jurisdiction of the sheriff of the Lothians and Peebles in this particular, and appoint the commissary clerk's office in Edinburgh as a domicile whereat they may be cited to all diets of court, at the instance of all and sundry having interest therein as law will, holding any citation legally affixed and left for us upon the walls of said office as sufficient as if we were personally summoned.—In witness whereof.

Attestation of Cautioner.

I, , one of His Majesty's justices of the peace for the county of , do hereby certify that , designed in the foregoing bond, is reputed a good and sufficient cautioner for the amount of the obligation thereby undertaken.

[*Name*]
[*Place*]
[*Date*]

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74. CONFIRMATION—Testament-Testamentar.

The Testament-Testamentar of umquhile D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in inventory of the estate of which confirmation has been craved, but not estate abroad.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said D. died at , upon , and that by his trust-disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*], dated , and recorded in the court books of the commissariot of Edinburgh upon , the said D. nominated and appointed [*design all of them*] A. and B.; C., in the event of his having attained the age of twenty-one years, which he has now attained; E., in the event of his being resident in this country, but who is now in India; F., who is now deceased; and G., who has declined to accept;—it being declared that the said A. shall

be a *sine qua non*, and that the said B. shall be entitled to act only while she continues unmarried—trustees under said trust disposition and settlement (and any other persons who might be assumed as such trustees), to be his executors. [*Where trustees have been assumed*, That the said A., B., and C., by deed of assumption, dated , and recorded in the said court books on , assumed H. and I. to be trustees under said trust disposition and settlement]. And that the said A., B., and C. [H. and I.], trustees, and as such executors foresaid, have given up on oath an inventory of the personal estate and effects of the said D. at the time of his death situated in Scotland [*or* in Scotland and England, *or* in Scotland and Ireland,[1] *or* Scotland, England, and Ireland,[1] *as the case may be*], amounting in value to £ ; which inventory as before written has likewise been recorded in said court books, of date : Therefore I, in His Majesty's name and authority, ratify, approve, and confirm the nomination of executors contained in the foresaid trust disposition and settlement [and deed of assumption] [*or other writing or writings containing or affecting the nomination of executors*]. And I give and commit to the said A., B., and C. [H. and I.], subject to the conditions attached to the appointment of the said A. and B., as above set forth, full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong: Providing always that they shall render just count and reckoning for their intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and

commissary clerk.

N.B.—Where there is English or Irish estate append the following note:—" The deceased died domiciled in Scotland " [*signed by clerk*].

Where confirmation issued under special authority, append the following note:—" Issued under special authority, conform to interlocutor of sheriff-substitute, dated " [*initialed by clerk*].

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75. CONFIRMATION—Testament-Testamentar—General Disponee.

[*Heading and inventory as in No.* **74**, *and proceed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said D. died at , upon , and that by his will, dated , and recorded in the court books of the commissariot of Edinburgh upon , the said D. bequeathed his whole estate heritable and moveable to A. [*design*]; that the said A., as such general disponee, is the executor-nominate of the said D., and that the said A., as executor foresaid, has given up on oath [*proceed as in No.* 74].

[1] See Chapter XVII.

76. CONFIRMATION—Testament-Testamentar—Residuary Legatees.

[*As in No.* **74**, *with this variation*]—the said D. appointed A., B., and C. [*design*] to be his trustees and executors, but that these appointments have failed by the predecease of the said A. and B. and by the declinature of the said C., and by the said will the said D. appointed E. and F. [*design*] to be his residuary legatees, and that by the failure of the said trustees the said E. and F. as residuary legatees are the executors-nominate of the said D., and that the said E. and F. as executors foresaid have given up on oath [*and so on*].

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77. CONFIRMATION—Testament-Dative.

The Testament-Dative of umquhile D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in inventory of the estate of which confirmation has been craved, but not estate abroad.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that by my decree, dated , I decerned A. [*design*], son and one of the next of kin of the deceased D., before designed [*or* legatee of the deceased D., before designed, conform to last will and testament produced; *or* factor for B. and C., minor and pupil children of the deceased D., before designed, conform to appointment by the sheriff-substitute at Edinburgh, dated , *or other relationship or title founded on in the writ*], executor-dative *qua* next of kin [*or* legatee, *or* factor for minor and pupil next of kin, *or other character in which decerniture has been granted*] of the said D., who died at , on : And seeing that the said A. has since given up, on oath, an inventory of the personal estate and effects of the said D., at the time of his death, situated in Scotland [*or* in Scotland and England, *or* in Scotland and Ireland,[1] *or* in Scotland, England, and Ireland,[1] *as the case may be*], amounting in value to ; which inventory, as before written, has been recorded in the court books of the commissariot of Edinburgh, of date , and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, make, constitute, ordain and confirm the said A. executor-dative *qua* next of kin [*or otherwise as above*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* next of kin [*or otherwise, as above*] is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of , nineteen hundred and .

commissary clerk.

Domicile, see No. 74.

[1] See Chapter XVII.

78. CONFIRMATION—Eik to Testament-Testamentar.

First Eik to the Testament-Testamentar of umquhile D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in inventory of the additional estate of which confirmation is craved, but not estate abroad.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said D. died at , on , and that A., B., C., H., and I. [*design all*], as [accepting, *where any of the executors named had declined, or*, surviving, *where any of the executors named had died, or*, accepting and surviving, *as the case may be*], executors-nominate of the said D., under and in virtue of trust disposition and settlement, and deed of assumption [*or other writing or writings relating to or affecting the nomination of executors*], dated , and recorded in the court books of the commissariot of Edinburgh on , gave up an inventory of his personal estate and effects on , and expede a testament-testamentar upon : And seeing that the said A., being now deceased, and the said B., being now married, and therefore, in terms of her appointment, no longer entitled to act as executor, the said C., H., and I. have given up, on oath, an additional inventory of the personal estate and effects of the said D. at the time of his death, situated in Scotland [*or* in England, *or* in Ireland,[1] *or in any two, or in all of these countries*], amounting in value to ; which additional inventory, as before written, has been recorded in said court books, of date : Therefore I, in His Majesty's name and authority, of new ratify, approve, and confirm the nomination of executors contained in the foresaid trust disposition and settlement, and deed of assumption [*or other writing or writings relating to or affecting the nomination of executors*]: And I give and commit to the said C., H., and I. full power to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid additional inventory, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong: Providing always that they shall render just count and reckoning for their intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of , nineteen hundred and .

commissary clerk.

Domicile, see No. 74.

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79. CONFIRMATION—Eik to Testament-Dative.

First Eik to the Testament-Dative of umquhile D. [*design*]

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in inventory of additional estate of which confirmation is craved, but not estate abroad.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that by my decree, dated , I decerned A. [*design*] executor-

[1] See Chapter XVII.

dative *qua* [*as in the original confirmation*] of the said D., who died at , on , and that the said A. gave up an inventory of the personal estate and effects of the said D. on , and expede a testament-dative upon : And seeing that the said A. has now given up, on oath, an additional inventory of the personal estate and effects of the said D. at the time of his death, situated in Scotland [*or* in England, *or* in Ireland,[1] *or in any two or in all of these countries*], amounting in value to , which additional inventory, as before written, has been recorded in the court books of the commissariot of Edinburgh, of date , and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, of new make, constitute, ordain, and confirm the said A. executor-dative *qua* [*as in the original confirmation*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid additional inventory, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* [*as in the original confirmation*] is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and .

commissary clerk.

Domicile, see No. 74.

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80. CONFIRMATION—Testament-Testamentar *ad omissa* (*et male appretiata*).

The Testament-Testamentar *ad omissa* (*et male appretiata*) of umquhile D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in from the inventory the items of estate to be confirmed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said D. died at upon , and that by his trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*] dated , and recorded in the court books of the commissariot of Edinburgh upon , the said D. nominated and appointed A. and B., whom failing C. [*design all*], to be his executors, and that the said A. and B. are both now deceased without having fully confirmed the personal estate of the deceased, and that C., substitute executor-nominate under the said trust disposition and settlement [*or other title as the case may be*], has given up, on oath, an inventory of the personal estate and effects *ad omissa* (*et male appretiata*) of the said D. at the time of his death, situated in Scotland [*or* in England, *or* in Ireland,[1] *or in any two, or in all of these countries*], amounting in value to , which inventory, as before written, has been recorded in said court books of date : Therefore I, in His Majesty's name and authority, ratify, approve, and confirm the nomination of the substitute executor contained in the foresaid trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*]: And I give and commit to the said C. full power to uplift, receive, administer, and dispose

[1] See Chapter XVII.

of the said personal estate and effects contained in the foresaid inventory *ad omissa* (*et male appretiata*), grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate *ad omissa vel male appretiata* is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and .

commissary clerk.

Domicile, see No. 74.

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81. CONFIRMATION—TESTAMENT-DATIVE *ad omissa* (*et male appretiata*).

THE TESTAMENT-DATIVE *ad omissa* (*et male appretiata*) OF UMQUHILE D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in from the inventory the items of estate to be confirmed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that by decree, dated , I decerned A. [*design*], son and one of the next of kin of the deceased D., before designed [*or* legatee of the deceased D., before designed, under his trust disposition and settlement produced, *or other relationship or title founded on in the petition*] executor-dative *ad omissa* (*et male appretiata*) *qua* next of kin [*or* legatee, *or other character in which decerniture has been granted*] of the said D., who died at on : And seeing that the said A. has since given up, on oath, an inventory of the personal estate and effects *ad omissa* (*et male appretiata*) of the said D., at the time of his death, situated in Scotland [*or* in England, *or* in Ireland,[1] *or in any two, or in all of these countries*], amounting in value to , which inventory *ad omissa* (*et male appretiata*) as before written, has been recorded in the court books of the commissariot of Edinburgh, of date , and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, make, constitute, ordain, and confirm the said A. executor-dative *ad omissa* (*et male appretiata*) *qua* next of kin [*or otherwise, as above*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid inventory *ad omissa* (*et male appretiata*) and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *ad omissa vel male appretiata qua* next of kin [*or otherwise as above*] is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and .

commissary clerk.

Domicile, see No. 74.

[1] See Chapter XVII.

82. CONFIRMATION—TESTAMENT-TESTAMENTAR *ad non executa.*

THE TESTAMENT-TESTAMENTAR *ad non executa* OF UMQUHILE D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in the inventory of estate to be confirmed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said D. died at upon , and that by a trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*] dated , and recorded in the court books of the commissariot, Edinburgh, upon , the said D. nominated and appointed A. and B. [*design*], to be his executors, and that the said A. and B. gave up an inventory of the personal estate and effects of the said D. on , and expede a testament-testamentar thereof in their favour on , but have both since died without having fully uplifted and transferred to the persons entitled thereto the estate confirmed by them: and that C., as substitute executor-nominate under the said trust disposition and settlement [*or other title as the case may be*], has now given up on oath an inventory of said personal estate and effects *ad non executa* situated in Scotland [*or* in England, *or* in Ireland,[1] *or in any two or in all of these countries*], amounting in value to , which inventory as before written, has been recorded in said court books of date : Therefore I, in His Majesty's name and authority, ratify, approve, and confirm the nomination of the substitute executor contained in the foresaid trust disposition and settlement [*or other writing or writings containing or affecting the nomination of executors*]: and I give and commit to the said C. full power to uplift, receive, administer, and dispose of the said personal estate and effects contained in the aforesaid inventory *ad non executa*, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate *ad non executa* is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and

commissary clerk.

Domicile, see No. 74.

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83. CONFIRMATION—TESTAMENT-DATIVE *ad non executa.*

THE TESTAMENT-DATIVE *ad non executa* OF UMQUHILE D. [*design*].

The said D. had pertaining and resting owing to him at the time of his decease—

[*Take in the inventory of estate to be confirmed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said D. died at , on , that A. and B. [*design*] as executors-nominate of the said D. under his will, dated

[1] See Chapter XVII.

, and recorded in the court books of the commissariot of Edinburgh, on [or that A. and B. (*design*), as executors-dative of the said D., decerned by me on], gave up an inventory of his personal estate and effects on and expede a confirmation thereof in their favour on , that the said A. and B. are both since dead without having fully uplifted and transferred to the persons entitled thereto the estate confirmed by them, and that by decree, dated , I decerned C. legatee of the said D. under his said will produced [*or* next of kin, *or other title or character founded on in the petition*], executor-dative *ad non executa qua* legatee [*or* next of kin, *or other title or character in which decerniture has been granted*] of the said D.: And seeing that the said C. has since given up, on oath, an inventory of the said personal estate and effects *ad non executa* situated in Scotland [*or* in England, *or* in Ireland,[1] *or in any two or in all of these countries*], amounting in value to , which inventory as before written, has been recorded in said court books, of date , and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, make, constitute, ordain, and confirm the said C. executor-dative *ad non executa qua* legatee [*or otherwise, as above*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects contained in the foresaid inventory *ad non executa*, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *ad non executa qua* legatee [*or otherwise, as above*] is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and

commissary clerk.

Domicile, see No. 74.

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84. CONFIRMATION—Confirmation-Nominate—Small Estate.

Confirmation issued under the Act 57 & 58 *Vict. c.* 30.

Confirmation in favour of C. D., residing at , executor-nominate of A. B. [*design*], who died testate on the day of , at , and had at the time of death his ordinary or principal domicile in the county of Edinburgh.

The said deceased A. B. had pertaining and resting owing to him at the time of his death the following personal estate and effects, viz.:—

[*Take in particulars of estate as specified in the inventory to be confirmed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said A. B. died testate, on the day of at , and had at the time of death his ordinary or principal domicile in : And further considering that the said A. B. by his will dated , and recorded in the court books of the commissariot of Edinburgh on , nominated and appointed the said C. D. to be his executor [*or* appointed the said C. D. to be his general disponee or universal legatory or residuary legatee, and

[1] See Chapter XVII.

as such his executor-nominate], and now seeing that the said C. D., as executor-nominate foresaid, has given up on oath an inventory of the whole personal estate and effects of the said A. B. at the time of his death, situated in Scotland [and England, and Ireland,[1] *as the case may be*], amounting in value to as therein and hereinbefore set forth, and that the said inventory has likewise been recorded in the said court books, on the said day of : Therefore I, in His Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foresaid will: And I give and commit to the said C. D. full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally everything concerning the same to do that to the office of an executor-nominate is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of , nineteen hundred and

commissary clerk.

Domicile, see No. 74.

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85. CONFIRMATION—Confirmation-Dative—Small Estate.

Confirmation issued under the Act 57 & 58 *Vict. c.* 30.

Confirmation-Dative of A. B. who resided at .

The said A. B. had pertaining and resting owing to him at the time of his decease—

[*Take in inventory of estate to be confirmed.*]

I, , esquire, sheriff of the Lothians and Peebles, considering that the said A. B. died at , on , and had at the time of death his ordinary or principal domicile in : and seeing that C. D., his [widow *or* son, *or* daughter; *or* disponee or legatee conform to testamentary writing produced; *or any other person entitled to representation other than as an executor-nominate*] has given up, on oath, an inventory of the personal estate and effects of the said A. B. at the time of his death, situated in Scotland [England, and Ireland,[1] *as the case may be*], amounting in value to , and has deponed that the gross value of the heritable and moveable property in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed [£100 *or* £300 *or*] £500, which inventory, as before written, has been recorded in the court books of the commissariot of Edinburgh of date , and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in His Majesty's name and authority, decern, make, constitute, ordain, and confirm the said C. D. executor-dative *qua* [relict, next of kin, *or other character in which confirmation may have been applied for*] to the deceased, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the

[1] See Chapter XVII.

office of executor-dative *qua* is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariot of the county of Edinburgh, and signed by the clerk of court at Edinburgh, the day of nineteen hundred and

commissary clerk.

Domicile, see No. 74.

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86. CONFIRMATION *ad omissa* WHEN THE ORIGINAL CONFIRMATION WAS UNDER THE SMALL ESTATES ACT, BUT THE TOTAL EXCEEDS £500—TESTATE.

And that the said A., B., and C., in terms of the Act 57 & 58 Vict. c. 30, s. 23, sub-sec. (7), gave up an inventory of the personal estate and effects of the said deceased on , and expede a confirmation-nominate on , but having since discovered additional estate of which confirmation is required, and that the whole personal estate and effects of the said deceased exceed £500, the limit under which an eik to the said confirmation-nominate might have been expede under the said section of the said Act, the said A., B., and C. have given up on oath an inventory of the personal estate and effects *ad omissa* of the said D. situated in Scotland [*or* in Scotland and England] amounting in value to [*this is the additional estate only*], , and craved confirmation thereof in common form, which inventory *ad omissa* as before written has likewise been recorded in the said court books of date . Therefore I [*common form but referring to* (*a*) personal estate and effects contained in the foresaid inventory *ad omissa*; and (*b*) office of executor-nominate *ad omissa*]. . . .

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87. THE LIKE, BUT INTESTATE.

That an inventory of the moveable estate of the said deceased was given up in the commissary court of Edinburgh on , and confirmation-dative was granted on under the Act 57 & 58 Vict. c. 30, s. 23, sub-sec. (7), but as the estate since discovered together with the sum given up in the original inventory exceeds £500, and an eik to the said confirmation cannot competently be expede, the deponent has been decerned on an initial writ executor-dative *ad omissa qua* next of kin to the said D.

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